

# CAN ETHNIC FEDERALISM PREVENT “RECOURSE TO REBELLION?” A COMPARATIVE ANALYSIS OF THE ETHIOPIAN AND IRAQI CONSTITUTIONAL STRUCTURES

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . .<sup>1</sup>

*Universal Declaration of Human Rights*

## INTRODUCTION

The debate over whether Iraq should adopt a federal system of government began months before the start of the United States-led invasion of Iraq. In January 2003, representatives of various Iraqi groups met in London to discuss their vision for the future of Iraq.<sup>2</sup> A representative of the Iraqi Turkmen Front issued a careful warning at those early meetings: “Federalism is dangerous now . . . if Kurds have a federal state, then the Turkmen should have one as well.”<sup>3</sup> Despite that warning, federalism was enshrined in the Iraqi Constitution, and the question remains whether the federal system will contribute to the success or to the failure of the Iraqi state.

The balance of power in any federal system is a delicate thing.<sup>4</sup> Every state that implements federalism must determine how to balance the autonomy granted to the states or regions against the authority of the central government.<sup>5</sup> Many of the countries that adopt federal systems do so in the hope that the federal system will provide for both a unified central government and real control at the local level. One theory of federalism argues that the system prevents abusive government by decentralizing power.<sup>6</sup> By vesting some power in regional governments, federalism renders central governments less

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<sup>1</sup> Universal Declaration of Human Rights, pmb., G.A. Res. 217A, U.N. Doc. A/810 (Dec. 10, 1948).

<sup>2</sup> DAVID L. PHILLIPS, *LOSING IRAQ* 112 (2005).

<sup>3</sup> *Id.* The problem identified by the speaker was the danger of continued fracturing of the country into smaller and smaller units. *See infra* Part I.

<sup>4</sup> Peter H. Schuck, *Federalism*, 38 CASE W. RES. J. INT’L L. 5, 8 (2006) (noting that the forces that create federalism also threaten to destroy it).

<sup>5</sup> *Id.*

<sup>6</sup> Bruce Ledewitz, *The Present and Future of Federalism*, 43 DUQ. L. REV. 645, 646 (2005); *see also* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2552–53 (2005).

able to establish authoritarian dictatorships.<sup>7</sup> The trend towards federalism among states that have previously experienced strong and oppressive central regimes can be understood in the context of this theory—a federal system might help to prevent oppressive dictators from once again monopolizing the power of the state to the detriment of its people.<sup>8</sup>

A theory of federalism's potential to prevent ethnic conflict has also developed in recent years.<sup>9</sup> Ethnic- or identity-based federalism, as an idea, holds a certain appeal in the post-colonial context. As a system of government, it attempts to resolve one of the problems that imperialist, colonial history created by granting autonomy to groups whose culture and identity have long been suppressed in the “unity” of modern nation-states.<sup>10</sup> A nation-state adopting an ethnic-based federal system gives the “nations” within its borders some degree of self-governance as regions or states in a federal system.<sup>11</sup> Ethnic federalism is one method by which a country may attempt to manage the interests of multiple ethnic groups within its borders and prevent violent ethnic conflict or attempts at secession. Professor Tully argues that there is no multi-cultural state in which culture is not a part of the political reality:

The diverse ways in which citizens think about, speak, act and relate to others in participating in a constitutional association . . . are always to some extent the expression of their different cultures. A constitution can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics.<sup>12</sup>

A basic assumption of the theory of identity-based federalism is that ethnicity or religious identity cannot be removed from the political sphere.

Federalism is presently a common system of government, having been adopted by countries across the globe, including Switzerland, the United Arab

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<sup>7</sup> Ledewitz, *supra* note 6, at 650–51.

<sup>8</sup> See Asnake Kefale, *The Politics of Federalism in Ethiopia: Some Reflections*, in FEDERALISM IN AFRICA: FRAMING THE NATIONAL QUESTION, 257, 269–70 (2003).

<sup>9</sup> See *infra* Part I.C.

<sup>10</sup> See generally JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL ‘NATIONAL’ IDENTITY (2000).

<sup>11</sup> See Graham Smith, *Mapping the Federal Condition: Ideology, Political Practice and Social Justice*, in FEDERALISM: THE MULTI-ETHNIC CHALLENGE 1, 2–3 (Graham Smith ed., 1995).

<sup>12</sup> JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 5–6 (1995).

Emirates, Canada, Malaysia, and Venezuela.<sup>13</sup> Federalism based on ethnicity, or the territorial subdivision of a country in a way that divides political power among conflicting groups, has also been implemented in many different countries,<sup>14</sup> including Ethiopia and, most recently, Iraq.<sup>15</sup> Ethiopia's experience integrating federalism, ethnic identity, and group rights into a constitutional document serves as one example of identity-based federalism. Ethnic federalism in Ethiopia involves not only the structure of the state, but a constitutional mandate to give self-rule to Ethiopia's many nations, nationalities, and peoples.<sup>16</sup> The Ethiopian Constitution establishes regional states along linguistic lines, which is the primary way in which individuals identify themselves in that country.<sup>17</sup> Iraq has also adopted a federal model as a way to band together a religiously and ethnically diverse country marked by deep and complex divisions.<sup>18</sup> However, Iraq's Constitution delayed the formation of regions until later action by the local units of government.<sup>19</sup> In Iraq, identity is defined by both ethnicity and religious sect.<sup>20</sup> The Iraq Constitution specifically recognizes the Kurdish state in the north.<sup>21</sup> It has been supposed that the rest of the country will eventually divide into a handful of regions aligned along various ethnic and religious lines, probably including an Arab Shi'a-dominated state in the south and an Arab Sunni state in the center of the country.<sup>22</sup> Iraq is approximately 97% Muslim: 60% Shi'a Arabs,

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<sup>13</sup> See generally HANDBOOK OF FEDERAL COUNTRIES, 2005 (Ann L. Griffiths ed., 2005).

<sup>14</sup> See generally Amy L. Chua, *Depoliticizing Ethnicity*, 48 AM. J. COMP. L. 181 (2000) (reviewing GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC (Michael E. Brown & Sumit Ganguly eds., 1997)). In Nigeria, the implementation of federalism along religious lines has not solved the problem of the implementation of the Shari'a. HANDBOOK OF FEDERAL COUNTRIES, *supra* note 13, at 235–36. India, by contrast, has generally been able to respond to the demands of ethnic groups through its federal system. Chua, *supra* note 14, at 182. India was negotiating with a myriad of groups that identify based on innumerable grounds, including religion, caste, and ethnicity. *Id.*

<sup>15</sup> See HAROLD G. MARCUS, A HISTORY OF ETHIOPIA 242 (2002); Jonathan Steele, *Iraqi Constitution Yes Vote Approved by UN*, GUARDIAN, Oct. 26, 2005, at 16.

<sup>16</sup> See ETH. CONST. pmbl. (1994), available at <http://www.ethiopianembassy.org/constitution.pdf>.

<sup>17</sup> Alem Habtu, *Ethnic Pluralism as an Organizing Principle of the Ethiopian Federation*, 28 DIALECTICAL ANTHROPOLOGY 91, 108 (2004).

<sup>18</sup> See Vanessa J. Jimenez, *Iraq's Constitutional Process: Challenges and the Road Ahead*, 13 HUM. RTS. BRIEF 21, 21 (2005).

<sup>19</sup> IRAQ CONST. arts. 115–18 (2005), available at <http://www.iraqigovernment.org/Content/Biography/English/constitution.htm>.

<sup>20</sup> Roger Owen, *What Iraq Will Look Like After the Elections*, BOSTON GLOBE, Nov. 27, 2005, at K11. Distinguishing between religious and ethnic identity is not important for purposes of this analysis. See *infra* Part I.A.

<sup>21</sup> IRAQ CONST. art. 116.

<sup>22</sup> Owen, *supra* note 20, at K11.

20% Sunni Arabs, and 17% Muslim Kurds; the remaining 3% consists of Sunni Turkmen, Christians, and other minorities.<sup>23</sup>

Exploring the idea of identity-based federalism with reference to both Ethiopia, whose ethnically-based federal system dates to 1994, and the nascent Iraqi experience of federalism organized around group identity, this Comment argues that ethnic-based federalism succeeds only insofar as it achieves a balance in power-sharing between regions and the central government. Decentralization of power to regional governments can easily be undermined, despite constitutional grants of power, while extensive regional autonomy can cripple the unity of a country by rendering the central government powerless. This Comment explores several areas in which failure to achieve balance can undermine the goals of ethnic federalism. The first area is the grant of political rights to individuals and groups in the country.<sup>24</sup> The second is the preservation of the rights of minorities—both minorities within the country as a whole and the rights of those who constitute a minority in a particular region.<sup>25</sup> The third is the balance of fiscal power.<sup>26</sup> Finally, this Comment examines the question of popular legitimacy in an ethnic federal system with reference to national elections and political participation.

Part I of this Comment introduces the theory of ethnic- or identity-based federalism, and its roots in international law and theories of ethnic conflict. Part II describes the development of federalism as a structural solution to conflict between groups in Ethiopia and Iraq. Part III describes Ethiopia's and Iraq's solutions regarding the devolution of power by the grant of individual and group political rights in the federal system based on ethnicity. Part IV addresses concerns in an identity-based federal system vis-à-vis the protection of minority rights. Part V examines how best to divide fiscal power between regions and the central government in an ethnic-based federal system. Part VI analyzes the struggle to maintain popular legitimacy in an ethnic-based federal system, referencing the examples provided by the most recent national elections in each country—the July 2005 elections in Ethiopia and the December 2005 elections in Iraq.

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<sup>23</sup> Peter W. Galbraith, *The Case for Dividing Iraq*, TIME, Nov. 13, 2006, at 28; Editorial, *Partitioning Iraq*, DALLAS MORNING NEWS, Feb. 4, 2007.

<sup>24</sup> See *infra* Part III.

<sup>25</sup> See *infra* Part IV.

<sup>26</sup> See *infra* Part V.

## I. THE THEORY OF FEDERALISM AND GROUP IDENTITY

In the past half century, ethnicity has become an increasingly important factor in world politics and political movements. Demands for secession are one destructive result of the rise of ethnic nationalist politics, which, if met, would fracture states into smaller, more ethnically homogenous units. Ethnic federalism structures a country in a way that purports to offer an alternative to secession by providing autonomy while preserving a unitary state.

### A. *Ethnicity and the Nation-State*

The 20th century saw the rise of the modern “nation-state,” a political phenomenon that developed over time in Europe, and emerged in the rest of the world only in the post-colonial era.<sup>27</sup> The concept of the modern nation-state is based on a premise of homogeneity of culture.<sup>28</sup> The theory of popular sovereignty emphasizes the political identity of individuals and conceives of culture as “irrelevant, capable of being transcended, or uniform.”<sup>29</sup> During the period of decolonization, many problems emerged in new post-colonial states. One problem was the territorial compass of states, which were often created in ways that would minimize the ability of the colonized to form alliances that would threaten the colonial administration.<sup>30</sup> Independence brought these difficulties to the forefront, as the inherently troublesome mixes of populations within these nations struggled to form stable governments.<sup>31</sup> As a result, in most countries in Africa with centralized governments, members of one ethnic group monopolize power.<sup>32</sup>

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<sup>27</sup> See generally Steven L. Solnick, *Federalism and State-Building: Post-Communist and Post-Colonial Perspectives*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 171 (Andrew Reynolds ed., 2002) (comparing the post-colonial problems of nation-building to the post-communism problems of nation-building).

<sup>28</sup> Yash P. Ghai, *Constitutional Asymmetries: Communal Representation, Federalism and Cultural Autonomy*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY, *supra* note 27, at 141, 141. The modern state focuses on individualism and the individual's relationship to the state; it generally does not address relations between the cultural groups within the state. *Id.*

<sup>29</sup> TULLY, *supra* note 12, at 63.

<sup>30</sup> See Alemante G. Selassie, *Ethnic Federalism: Its Promises and Pitfalls for Africa*, 28 YALE J. INT'L L. 51, 97 (2003).

<sup>31</sup> The Secretary-General, *Report on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, ¶ 5, U.N. Doc. S/1998/318, A/52/871 (Apr. 13, 1998). Although in 1963 the Organization of African Unity accepted the boundaries “inherited from colonial authorities[,] . . . the challenge of forging a genuine national identity from among disparate and often competing communities has remained.” *Id.* ¶ 8.

<sup>32</sup> Mwangi S. Kimenyi, *Harmonizing Ethnic Claims in Africa*, in ETHNICITY AND GOVERNANCE IN THE THIRD WORLD 101, 116 (John Mukum Mbaku, Pita Ogaba Agbese & Mwangi S. Kimenyi eds., 2001).

A basic source of this problem is that despite attempts to construct a “national identity,” ethnic identification, as a primary source of identity, is high in Africa<sup>33</sup> and indeed in the world as a whole.<sup>34</sup> In Africa, there is still a tendency for individuals to think of themselves primarily as Oromo, Hutu, or Masai rather than as Ethiopian, Rwandan, or Kenyan. Although scholars have debated the way in which ethnicity is constructed, they agree as to its re-emerging importance in the past decades.<sup>35</sup> It is generally accepted that ethnicity is the product of social construction rather than being somehow primordial or innate.<sup>36</sup> A distinction must be made between ethnic categories that are created by outsiders and ethnic communities as defined from within.<sup>37</sup> For the purposes of understanding the theory of ethnic federalism, the ethnic labels outsiders employ to distinguish different groups of people with certain customs and traditions are not relevant. Rather, the definition of “identity” that is used in this context is the sense within a group that they are a people, a nation. This definition focuses on a sense of “solidarity,” often fostered by “a myth of common ancestry [or identification with a] historic territory or homeland.”<sup>38</sup> This definition renders unnecessary distinctions between ethnic identification based on language and ethnicity in Ethiopia and identification based on religious sect and ethnicity in Iraq. What is important is the sense among a community of people of having a distinct identity, however defined.

### *B. Group Rights and Self-Determination in International Law*

Self-determination, as a right in international law, began as the idea that colonies have the right to be free from colonial domination,<sup>39</sup> which was based broadly on democratic ideals and the right to political representation—the right to a government ruled by the will of the people. However, the right to self-determination has arguably evolved to include the right of groups of people within states to some degree of autonomy or political representation within their state.<sup>40</sup> At its most extreme form, the right to self-determination has been

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<sup>33</sup> *Id.* at 108.

<sup>34</sup> John Mukum Mbaku, Pita Ogaba Agbese & Mwangi S. Kimenyi, *Introduction to ETHNICITY AND GOVERNANCE IN THE THIRD WORLD*, *supra* note 32, at 1, 2–3.

<sup>35</sup> Habtu, *supra* note 17, at 93.

<sup>36</sup> *Id.* at 94–95.

<sup>37</sup> *Id.* at 95.

<sup>38</sup> *Id.*

<sup>39</sup> See Mtendeweka Owen Mhango, *Recognizing a Right to Autonomy for Ethnic Groups Under the African Charter on Human and Peoples' Rights: Katangese Peoples Congress v. Zaire*, 14 HUMAN RIGHTS BRIEF 11, 11 (2007).

<sup>40</sup> *Id.* at 11–13.

invoked as the basis for establishing the right of oppressed ethnic groups to secession from the state.<sup>41</sup>

International law has come to acknowledge the right to self-determination in the colonial context, but no consensus exists as to whether it includes a right to secession in the absence of extreme oppression.<sup>42</sup> A right to secession would mean that “nations” (as opposed to the political unit of “nation-states”) divided by national boundaries and merged with other groups into modern nation-states by arbitrary colonial boundaries have the right to secede and form their own states.<sup>43</sup>

The foundations of the idea of a right to self-determination can be traced back to the American and French Revolutions, and the democratic concept that the “consent of the governed”<sup>44</sup> forms a government. The modern idea emerged in the early 1900s, and gained ascendancy in the era of decolonization.<sup>45</sup> Originally, the concept was applied as the right of colonies to political independence, to break free of their imperial yoke.<sup>46</sup> The 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>47</sup> expressed the principle of self-determination and the need for decolonization and was passed unanimously in the U.N. General Assembly.<sup>48</sup> While international law came to recognize that former colonies were “peoples” entitled to self-determination,<sup>49</sup> a quandary that arose in the era of decolonization was that these former colonies were not “nations” in any

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<sup>41</sup> See Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365, 369 (2002).

<sup>42</sup> KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 1–2 (2002).

<sup>43</sup> CHRISTIAN P. SCHERRER, THE STRUCTURAL PREVENTION OF ETHNIC VIOLENCE 124–26 (2002); Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 5, 5 (2003).

<sup>44</sup> CASTELLINO, *supra* note 10, at 11. If the only legitimate political rule is by the consent of the governed, the people of a political entity have the right to determine the future of their country. See generally TULLY, *supra* note 12, at 59. Human rights theory, after World War II, focused not only on the protection of the powerless from the powerful, but also on the concept of self-governance as the necessary basis of a liberal democracy, which is the foundation of the modern understanding of human rights. See Joseph Khawam, *A World of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective*, 37 COLUM. HUM. RTS. L. REV. 717, 717–18 (2006).

<sup>45</sup> DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 54 (2d ed. 2006); see also CASTELLINO, *supra* note 10, at 13.

<sup>46</sup> CASTELLINO, *supra* note 10, at 1. There is still no agreement as to the application of the right beyond the confines of a right belonging to existing countries. See Makau Mutua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927, 949–51 (2006).

<sup>47</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (Dec. 14, 1960).

<sup>48</sup> CASTELLINO, *supra* note 10, at 22.

<sup>49</sup> KNOP, *supra* note 42, at 51–53.

traditional sense, but more akin to “patchwork quilts of different tribes [without a] common ethnicity or language.”<sup>50</sup> Thus, in the post-colonial context, the application of the principle of self-determination became more difficult.<sup>51</sup>

To broaden the right of self-determination to include the right of secession, two issues must be addressed: the first is whether the ethnic groups within nations may qualify as the “people” who own the right of self-determination, and the second is what circumstances would justify political secession.<sup>52</sup> The main difficulty arises in determining who the “people” are who own the right to self-determination.<sup>53</sup> The classical model identified the nation or “people” as the political state.<sup>54</sup> Under the secessionist model, the application of the term “people” would be broadened to include an “authentic” community.<sup>55</sup> In defining what constitutes an authentic community, one suggestion is that when a group acts to assert its right to self-determination, it *becomes* a “people” by virtue of those actions.<sup>56</sup> Another possibility is that a “people” is any community that “has a distinct character.”<sup>57</sup> Such vague definitions readily apply to an ethnic group within the territory of a larger ethnically diverse nation. The international law principle that stands counter to the right of secession is the “principle of territorial integrity”—the idea that the modern borders of nation-states may not be altered.<sup>58</sup> If this principle were absolute, there could be no right of secession. Whether the right to secession exists has not been established definitively.

The concept of self-determination has been broadened from its original narrow anti-colonial definition. The 1966 International Covenants on Economic, Social and Cultural Rights<sup>59</sup> and Civil and Political Rights<sup>60</sup> both

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<sup>50</sup> *Id.* at 55.

<sup>51</sup> CASTELLINO, *supra* note 10, at 1.

<sup>52</sup> KNOP, *supra* note 42, at 51.

<sup>53</sup> See Kristin Henrard & Stefaan Smis, *Recent Experiences in South Africa and Ethiopia to Accommodate Cultural Diversity: A Regained Interest in the Right of Self-Determination*, 44 J. AFR. L. 17, 19–22, 46 (2000) (discussing the concept of a “people” in greater detail than is necessary here and noting that there is no clear understanding of who owns the right to self-determination).

<sup>54</sup> CASTELLINO, *supra* note 10, at 9.

<sup>55</sup> *Id.* at 9–10.

<sup>56</sup> KNOP, *supra* note 42, at 60.

<sup>57</sup> *Id.* at 61.

<sup>58</sup> *Id.* at 74–75.

<sup>59</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>60</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, Sen. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].



articulate what may be termed a “norm of self-determination.”<sup>61</sup> Article One in both covenants states the following: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>62</sup> Thus, the right to self-determination was extended to all peoples, not only to the colonies.<sup>63</sup> In 1970, the General Assembly passed a declaration regarding friendly inter-state relations.<sup>64</sup> The resolution, which was accepted by broad consensus, declared that each state should realize “the principle of equal rights and self-determination of peoples.”<sup>65</sup> While generally held that in most cases self-determination cannot be exercised in a way that fractures existing national boundaries, the international law community has interpreted this Declaration as carving out a possible exception. The right to self-determination may justify secession if a state severely discriminates against one racial or religious group, or if that group is unrepresented in the government or is the victim of severe human rights abuses.<sup>66</sup> Another view is that the proper concept is “internal self-determination,” that the right to self-determination should be exercised within a state through political representation and structural mechanisms.<sup>67</sup>

### C. Federalism as a Solution to Ethnic Conflict

Ethnic federalism is an attempt to create a territorial solution to ethnic conflict by acknowledging the need to grant some degree of autonomy to ethnic groups within a state but attempts to do so without complete secession. As Professor Tully explains:

The most familiar form of the politics of cultural recognition is the claims of nationalist movements to be constitutionally recognised as either independent nation states or as autonomous political associations within various forms of multinational federations and confederations.<sup>68</sup>

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<sup>61</sup> CASTELLINO, *supra* note 10, at 31.

<sup>62</sup> ICESCR, *supra* note 59, art. 1(1); ICCPR, *supra* note 60, art. 1(1). All parties to the convention are to “promote the realization of the right of self-determination.” ICESCR, *supra* note 59, art. 1(3); ICCPR, *supra* note 60, art. 1(3).

<sup>63</sup> CASTELLINO, *supra* note 10, at 32.

<sup>64</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter *Friendly Relations*]; *see also* CASTELLINO, *supra* note 10, at 34–35.

<sup>65</sup> CASTELLINO, *supra* note 10, at 36 (*quoting* *Friendly Relations*, *supra* note 64, pmb1.).

<sup>66</sup> KNOP, *supra* note 42, at 74. Note that such a formulation also proscribes representative democracy as the only internationally valid form of government. *Id.* at 76.

<sup>67</sup> Henrard & Smis, *supra* note 53, at 23.

<sup>68</sup> TULLY, *supra* note 12, at 2.

Federalism based on ethnic divisions provides a solution to demands for recognition without dissolving the unity of the nation-state. Ethnic-based federalism is an institutional arrangement that acknowledges and uses ethnic units “as a basis for local governments,” in the hopes that doing so will harmonize inter-group conflicts.<sup>69</sup> From another perspective, ethnic federalism is the attempt to align affective communities with political communities.<sup>70</sup> Affective communities are groups held together by a “personal or emotional connection,”<sup>71</sup> such as religion or ethnicity.<sup>72</sup> Political communities are bound by common decision-making processes, not social or emotional ties.<sup>73</sup> A federal structure based on ethnicity is only appropriate when ethnic groups generally associate with a particular territory, and the territorial sub-parts of a nation are, therefore, able to generally align with regions inhabited by distinct ethnic groups.<sup>74</sup>

The challenge of ethnic federalism is to create a state whose citizens perceive themselves as having a dual identity, both as members of a particular group and as citizens of the nation-state.<sup>75</sup> Those who criticize the system of ethnic federalism claim that rather than facilitate this dual identity, it reinforces the divisions in the society or encourages the creation of new divisions, making tensions higher and fragmentation of the state more likely.<sup>76</sup> Proponents of the theory argue that political actors will “act in accordance with the underlying ethnic power structure,” whether it is recognized or unrecognized.<sup>77</sup> Where ethnicity is a powerful force, political actors are not likely to act without reference to ethnicity simply because political structures do not openly reflect or acknowledge ethnicity.<sup>78</sup> Ethnically-based federal systems tend to be established where there has been a history of strong centralized government

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<sup>69</sup> Kimenyi, *supra* note 32, at 103; Schuck, *supra* note 4, at 8 (stating generally that federalism can have an important role in nation building and noting that federal systems are created in four ways, including one in which an existing state chooses to divide into federal regions along cultural lines). See generally Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 188 (2005) (arguing that overall federal regimes provide greater protection for local autonomy than other forms of government).

<sup>70</sup> Selassie, *supra* note 30, at 58–60.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Kimenyi, *supra* note 32, at 119.

<sup>75</sup> Smith, *supra* note 11, at 2–3.

<sup>76</sup> *Id.* at 3.

<sup>77</sup> Elena A. Baylis, *Beyond Rights: Legal Process and Ethnic Conflicts*, 25 MICH. J. INT’L L. 529, 532 (2004).

<sup>78</sup> *Id.*

and dominant national power.<sup>79</sup> In response to their past lack of power in the centralized state, minorities within the state may seek some degree of autonomy, the freedom to rule themselves in accordance with their own ways and customs.<sup>80</sup>

Critics of ethnic federalism have raised several challenges to this system of government. First, unless a state is divided into irrationally small sections, some number of minority groups will remain in the various sub-parts. These minorities may be excluded from participation in the ethnically-based sub-government or in the local economy.<sup>81</sup> However, ethnic federalism also provides a unique opportunity for developing minority rights. Second, ethnic federal structures are usually asymmetrical in nature, affording each group different rights and privileges.<sup>82</sup> This asymmetry may simply be a product of geography, with some groups historically living on fertile land containing great natural resources and others living on arid land with no natural resources. While federalism may produce a temporary consensus between the different groups in the formation process, asymmetrical systems are inherently difficult to operate, requiring “great administrative capacity and political skills” already lacking in many developing nations.<sup>83</sup> Asymmetry also results in inequalities that amplify inter-group animosity, threatening the very core of the federal system.<sup>84</sup> Administrative difficulties are most problematic in the area of fiscal federalism, an area in which asymmetries may be most strongly felt.<sup>85</sup> Lastly, some argue that since ethnicity holds people together not by a reasonable policy choice, but by emotion, ethnic identity will be manipulated as a political resource and used to create blind support and loyalty.<sup>86</sup> Others counter that ethnic federalism does not create a vehicle of manipulation, but merely institutionalizes ethnic politics, and that it is impossible to “eliminate, overcome or transcend [the] cultural dimension of politics.”<sup>87</sup>

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<sup>79</sup> Ghai, *supra* note 28, at 157–58.

<sup>80</sup> *Id.* at 158.

<sup>81</sup> Selassie, *supra* note 30, at 90. The question of the protection of human rights in the system of ethnic federalism is addressed in Part IV.

<sup>82</sup> Ghai, *supra* note 28, at 158–62.

<sup>83</sup> *Id.* at 160–61.

<sup>84</sup> See Schuck, *supra* note 4, at 11.

<sup>85</sup> See discussion *infra* Part V.

<sup>86</sup> Selassie, *supra* note 30, at 58–60.

<sup>87</sup> TULLY, *supra* note 12, at 5–6.

Proponents of ethnic federalism believe that despite these concerns, the system can still meaningfully negotiate ethnic tensions.<sup>88</sup> Making the ethnic divisions part of the structure of the state may relieve fears of abuse based on ethnic identity, thus reducing the ability of leaders to manipulate using ethnic identity. Some ethnic theorists maintain that rather than further increase the problems of a nation by increasing friction between ethnic groups and allowing despotic rulers the freedom to use ethnicity to gain the unquestioned support of the people, ethnic federalism may instead actually reduce inter-group tensions:

Such official recognition of ethnic and national differences could help mitigate age-old tensions. After all it is not the diversity that exist [sic] between or among peoples and cultures of a given country that causes conflicts, it is instead the way one manages or mis-manages difference.<sup>89</sup>

There will always be conflict, and conflict itself is not unhealthy. Only conflict expressed through violent means is devastating to both nations and peoples. Thus, the goal of ethnic federalism is to create a political structure through which ethnic groups may express conflicts peacefully, without resort to civil war or violent secession.

## II. BACKGROUND AND CONTEXT

Ethiopia and Iraq have experienced similarly dark and painful histories. Although neither experienced a long colonial history, both were subjected to local empires that controlled their territory until the past century.<sup>90</sup> Both nations have experienced a mix of authoritarian government and nationalist policies, including the policy of Amharic supremacy under the Emperors of Ethiopia, the Arab Sunni preference under the Ottoman Empire, the Derg's rhetoric of "Ethiopian" nationalism, and Ba'athist pan-Arab nationalism.<sup>91</sup> Over the past century, authoritarian regimes in both states have perpetrated massive human rights abuses and terrible campaigns of violence, a number of which were specifically targeted at particular ethnic or religious populations. The Ethiopian Oromo have been systematically oppressed for centuries, and the Red Terror campaign targeted any group or people that did not support the

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<sup>88</sup> See Kefale, *supra* note 8, at 269–70.

<sup>89</sup> *Id.*

<sup>90</sup> See CHARLES TRIPP, A HISTORY OF IRAQ 8 (2002) (relating the history of the addition of Iraq to the Ottoman Empire in the 16th century); Habtu, *supra* note 17, at 99 (describing Ethiopia as an African empire).

<sup>91</sup> See *infra* Part II.A.1, B.1.

Derg's campaigns in the name of "Ethiopian" identity.<sup>92</sup> In Iraq, Saddam Hussein and "Chemical Ali" used chemical weapons against the Kurds and the Shi'a in the name of national unity and Arab identity.<sup>93</sup>

Both countries reacted to an oppressive past by adopting ethnic federalism. Ethiopian rebel groups adopted a federal constitution in 1994 that placed great emphasis on group rights.<sup>94</sup> The drafters of the 2005 Iraqi Constitution granted greater power and importance to the regions than to the central government of Iraq.<sup>95</sup> Beginning with Ethiopia and turning to Iraq, the following sections describe their respective histories of oppression and the federal structures established through their constitutions.

### A. *Ethiopian Ethnic Federalism*

For most of its history, Ethiopia has been ruled by oppressive regimes that identify with and support a particular ethnic or religious identity. Ethiopia's history as a centralist state influenced the drafting of its federal constitution in 1994. However, the thirteen years since its adoption unfortunately have not seen a meaningful decentralization of power.

#### 1. *The Emergence of Ethnic Federalism in Ethiopia*

Ethiopia's history is littered with failed attempts to create a multi-ethnic unitary state in which "all citizens feel a primary allegiance to the state itself rather than to their particular ethnic group."<sup>96</sup> In Ethiopia, ethnicity is defined by reference to language. Although the popular imagination aligns language with ethnic descent, it is common for Ethiopians to have "multiple ethnic genealogies" due to inter-marriage over the centuries.<sup>97</sup>

Often described as one of the only African countries to have escaped colonialism, except for a brief five-year period of Italian control, Ethiopia was never ruled by Europeans.<sup>98</sup> Ethiopia is more rightly understood as a non-colonial African empire, which operated through force and oppression of other

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<sup>92</sup> See *infra* Part II.A.1.

<sup>93</sup> See *infra* Part II.B.1.

<sup>94</sup> See FASIL NAHUM, CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT 49–52 (1997).

<sup>95</sup> See Kanan Makiya, Op-Ed., *Present at the Disintegration*, N.Y. TIMES, Dec. 11, 2005, at WK13.

<sup>96</sup> Edmond J. Keller, *Making and Remaking State and Nation in Ethiopia*, in BORDERS, NATIONALISM, AND THE AFRICAN STATE 87, 87 (Ricardo René Laremont ed., 2005).

<sup>97</sup> Habtu, *supra* note 17, at 108.

<sup>98</sup> Keller, *supra* note 96, at 92–93.

African peoples.<sup>99</sup> During the reign of Emperor Menelik II (1889-1913),<sup>100</sup> Ethiopia expanded southwards, which “resulted in the creation of a multi-ethnic state [in which] various ethnic and national groups became subjects of a predominantly Christian and northern state.”<sup>101</sup> For the emperors of Ethiopia, “assimilation [was] an important strategy of sustaining their dominance.”<sup>102</sup> The conquered peoples in the south were considered inferior in the Christian empire, and to gain position or power in the empire, they would assimilate, adopting Amharic language and culture, thereby losing their own.<sup>103</sup> This discrimination against the non-Amharic and southern peoples is not merely ancient history. Rather, the “inequalities, exploitation, and discrimination visited on southerners by the empire and its representatives sowed the seeds of ethno-regional conflict that continue to plague Ethiopia today.”<sup>104</sup>

Ethiopia has continued to be ruled by centralized and oppressive regimes into the twentieth century.<sup>105</sup> Under the Emperor Haile Selassie, who ruled until the 1974 coup, language and religious rights were heavily restricted.<sup>106</sup> Publication in local languages was limited or outright banned and Orthodox Christianity was highly favored.<sup>107</sup> The discrimination extended beyond linguistic and religious preference and was evidenced in spending policies, the vast majority of government schools and other social services were located in the north.<sup>108</sup> The emperor ruled by exploitation and subjugation, overtly favoring the Amhara, rather than by attempting to build a national “Ethiopian” identity among the southern peoples.<sup>109</sup>

After a military coup d’etat in 1974, the Derg (“committee” in Amharic),<sup>110</sup> an authoritarian socialist regime, came to power in Ethiopia.<sup>111</sup> The ideology held by the government was the prime importance of national unity and

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<sup>99</sup> Habtu, *supra* note 17, at 99; Kefale, *supra* note 8, at 258.

<sup>100</sup> Habtu, *supra* note 17, at 99.

<sup>101</sup> Kefale, *supra* note 8, at 258.

<sup>102</sup> *Id.*

<sup>103</sup> See Asafa Jalata, *The Emergence of Oromo Nationalism and Ethiopian Reaction, in* OROMO NATIONALISM AND THE ETHIOPIAN DISCOURSE: THE SEARCH FOR FREEDOM AND DEMOCRACY 3–4 (Asafa Jalata ed., 1998).

<sup>104</sup> Keller, *supra* note 96, at 92–93; see also Henrard & Smis, *supra* note 53, at 38–39.

<sup>105</sup> Kefale, *supra* note 8, at 258–60.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> MARCUS, *supra* note 15, at 165.

<sup>109</sup> Keller, *supra* note 96, at 95; see also Kefale, *supra* note 8, at 259.

<sup>110</sup> MARCUS, *supra* note 15, at 187.

<sup>111</sup> *Id.* at 188–89.

“Ethiopia above all.”<sup>112</sup> Under the Derg, the military launched the Red Terror, a campaign of massive human rights abuses against the population at large that effectively silenced all overt opposition to the government.<sup>113</sup> The villagization campaign, touted as necessary to provide modern services to the rural communities, was charged with organizing villages along roads for the real purpose of forming a “more easily exploitable and controlled population.”<sup>114</sup> The Derg, in the later years of their rule, began to suppress cultural identity like the regimes before them, forbidding the use of local languages, traditional forms of governance, and cultural ceremonies.<sup>115</sup>

In 1991, the Derg government fell, and the rebel groups filled the gap.<sup>116</sup> The rebel groups most responsible for the overthrow of the Derg regime and taking control of Addis Ababa and Asmara were the Tigrayan People’s Liberation Front (TPLF) and the Eritrean People’s Liberation Front (EPLF).<sup>117</sup> Eritrea, under the control of the EPLF, declared its independence one week after the fall of the Derg.<sup>118</sup> In Ethiopia, under the leadership of the TPLF, the Transitional Government was formed as a “broad coalition in which the major national liberation movements and other political organizations were given representation.”<sup>119</sup> After the 1992 elections, the Transitional Government established a Constitutional Commission, and on December 8, 1994, the new Constitution was approved, establishing the Federal Democratic Republic of Ethiopia.<sup>120</sup>

## 2. *Ethiopia’s 1994 Constitution*

The 1994 Constitution was drafted with the purpose of breaking the tradition of oppression and authoritarian central power in Ethiopia. The Ethiopian Constitution created a two-tier federal system.<sup>121</sup> There are nine

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<sup>112</sup> *Id.* at 187.

<sup>113</sup> *Id.* at 195–201.

<sup>114</sup> *Id.* at 208–09.

<sup>115</sup> Jon Abbink, *Ethnicity and Constitutionalism in Contemporary Ethiopia*, 41 J. OF AFR. L. 159, 165 (1997).

<sup>116</sup> MARCUS, *supra* note 15, at 221.

<sup>117</sup> See ETHIOPIA SINCE THE DERG: A DECADE OF DEMOCRATIC PRETENSION AND PERFORMANCE 27 (Siegfried Pausewang, Kjetil Tronvoll & Lovise Aalen eds., 2002) [hereinafter SINCE THE DERG]; Matthew McCracken, Note, *Abusing Self-Determination and Democracy: How the TPLF is Looting Ethiopia*, 36 CASE W. RES. J. INT’L L. 183, 183 (2004).

<sup>118</sup> MARCUS, *supra* note 15, at 231.

<sup>119</sup> SINCE THE DERG, *supra* note 117, at 29.

<sup>120</sup> *Id.* at 36, 38; MARCUS, *supra* note 15, at 242.

<sup>121</sup> Kefale, *supra* note 8, at 261–63.

regional states whose borders are meant to fall along ethno-linguistic lines.<sup>122</sup> The actual boundaries of the nine states were to be determined through agreement between the states, or through arbitration when agreement could not be reached.<sup>123</sup> The states each have their own legislative, executive, and judicial branches.<sup>124</sup> The highest authority of the state is the State Council, which has the power to create and amend the state constitution, as well as the power to legislate in areas under state control.<sup>125</sup> States are further sub-divided into smaller units of local government, namely *Zonal*, *Woreda* and *Kebele*.<sup>126</sup> The State Council is obligated to decentralize its administrative activities and grant power to the lowest units of government such that “the People [are enabled] to participate directly in the administration of such units.”<sup>127</sup>

The central government under the Constitution is a parliamentary system, in which there are two houses.<sup>128</sup> The House of People’s Representatives is composed of representatives elected in direct elections for a term of five years.<sup>129</sup> Generally, the members are elected by electoral district, but special provisions are made for minority Nationalities and Peoples who are guaranteed at least 20 of the total number of seats, which must be less than 550.<sup>130</sup> The second federal house is the House of Federation, which is composed of representatives of each “Nation, Nationality and People.”<sup>131</sup> Each nation, nationality, or people must have at least one representative, and is given “one additional representatives [sic] for each one million of its population.”<sup>132</sup> The House of People’s Representatives generally has power over national and inter-state issues, including the regulation of inter-state roads, nationality, and the enactment of federal codes.<sup>133</sup> The House of Federation maintains powers over issues relating to the rights of states, such as the power to decide issues

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<sup>122</sup> ETH. CONST. arts. 46, 47(1) (1994). The nine states are: State of Tigray; State of Afar; State of Amhara; State of Oromia; State of Somalia; State of Benshangul/Gumuz; State of Southern Nations, Nationalities, and Peoples; State of Gambella Peoples; and State of Harari People. *Id.* art. 47(1).

<sup>123</sup> *Id.* art. 48.

<sup>124</sup> *Id.* art. 50(2).

<sup>125</sup> *Id.* art. 50(3), (5).

<sup>126</sup> Kefale, *supra* note 8, at 261–63; *see also* Abbink, *supra* note 115, at 167 (noting that the *woreda* within a region also were aligned along ethnic lines).

<sup>127</sup> ETH. CONST. art. 50(4).

<sup>128</sup> *Id.* arts. 45, 53.

<sup>129</sup> *Id.* art. 54(1).

<sup>130</sup> *Id.* art. 54(2)-(3).

<sup>131</sup> *Id.* art. 61(2).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* art. 55(4)-(14).



relating to “the right to secession.”<sup>134</sup> While the House of People’s Representatives has the power to declare war on other countries,<sup>135</sup> the House of Federation has the power to order federal intervention in any state that, “in violation of this Constitution, endangers the constitutional order.”<sup>136</sup>

### 3. *Post-Constitution Developments*

Despite the federal structure and the apparent broad grant of autonomy to regions and local units of government in the 1994 Constitution, in practice Ethiopia remained highly centralized after ratification. The goals of this new constitution have not been realized in Ethiopian politics or life. Soon after the revolution, the TPLF established a coalition, the Ethiopian People’s Revolutionary Democratic Front (EPRDF), which remains the ruling coalition of Ethiopia today and continues to be controlled by the TPLF.<sup>137</sup> The EPRDF won the majority of both local and national seats in the 1992 elections largely by eradicating their opponents through force and intimidation.<sup>138</sup> It consolidated its control over Ethiopian politics in the 1995 elections, which Norwegian election-monitors declared were “neither fair, free nor impartial.”<sup>139</sup> Although opposition parties were theoretically allowed to participate in the 2000/2001 elections, these elections saw more intimidation and force against opposition candidates by the national police force.<sup>140</sup> In the Ethiopian national elections of May and August 2005, opposition parties were allowed to carry on a real campaign, which resulted in a large minority block in the Ethiopian Parliament.<sup>141</sup> However, any hopes of democratic progress were lost in the crackdown on opposition following the elections.<sup>142</sup>

Ethiopia remains under the control of the EPRDF, who, while maintaining its control through undemocratic means, have introduced democratic institutions and the façade of democracy, something unknown under the brutal

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<sup>134</sup> *Id.* art. 62(3).

<sup>135</sup> *Id.* art. 55(15)-(17).

<sup>136</sup> *Id.* art. 62(9).

<sup>137</sup> MARCUS, *supra* note 15, at 229–31.

<sup>138</sup> SINCE THE DERG, *supra* note 117, at 30–35.

<sup>139</sup> *Id.* at 38.

<sup>140</sup> *Id.* at 234–35.

<sup>141</sup> THE CARTER CENTER, FINAL STATEMENT ON THE CARTER CENTER OBSERVATION OF THE ETHIOPIA 2005 NATIONAL ELECTIONS 2 (2005), available at <http://www.cartercenter.org/documents/2199.pdf> [hereinafter CARTER CENTER STATEMENT]; *Ethiopian Polls Body Releases Official Result of Elections*, (Ethiopian Radio broadcast Sept. 5, 2005), reprinted in BBC Monitoring International Reports [hereinafter *Official Result*].

<sup>142</sup> See *infra* Part IV.A.

Derg regime.<sup>143</sup> But to the political actors, who are kept out of the political process, what was first a promise or hope of real democracy became a “Tigrayan ethnonationalist dictatorship.”<sup>144</sup> While the Constitution established a federal governmental structure, decentralization and power-sharing did not fully occur, both because of administrative inability in the regions and because the regional governments were effectively controlled by “representatives of the TPLF.”<sup>145</sup> Ethnicity continues to shape the political landscape of Ethiopia. The current EPRDF government of Ethiopia promotes “ethnicity as the most important determinant for political and economic activities.”<sup>146</sup>

Nearly all political parties are aligned with a particular ethnicity, and the national government functions through larger multi-ethnic coalitions. The EPRDF includes the Oromo People’s Democratic Organization, the Amhara Nation Democratic Movement, and the TPLF.<sup>147</sup> The Coalition for Unity and Democracy (CUD), which won the largest opposition block in the 2005 elections,<sup>148</sup> is perceived as promoting Amharic language and identity as the only authentic Ethiopian identity.<sup>149</sup> The other opposition parties that gained seats in the 2005 elections are also ethnically-identified.<sup>150</sup> The two main rebel groups in Ethiopia, the Oromo Liberation Front and the Ogaden People’s Liberation Front, are ethnically-identified as well.<sup>151</sup>

#### B. *The 2005 Constitution of Iraq*

The Iraq Constitution of 2005 also emerged in the wake of centralized authoritarian regimes. The history of Arab Sunni preferment dates back to

<sup>143</sup> SINCE THE DERG, *supra* note 117, at 235–36.

<sup>144</sup> ASAFA JALATA, FIGHTING AGAINST THE INJUSTICE OF THE STATE AND GLOBALIZATION 57 (2001).

<sup>145</sup> SINCE THE DERG, *supra* note 117, at 231; *see also* Meheret Ayenew, *Decentralization in Ethiopia: Two Case Studies on Devolution of Power and Responsibilities to Local Government Authorities*, in ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW 130, 131 (Bahru Zewde & Siegfried Pausewang eds., 2002).

<sup>146</sup> Kefale, *supra* note 8, at 257.

<sup>147</sup> Dagne Biazen, *Nations, Nationalities Vow to Move Forward with EPRDF*, ETH. HERALD, Dec. 22, 2005 [hereinafter *Nations, Nationalities*].

<sup>148</sup> *Official Result*, *supra* note 141.

<sup>149</sup> Leenco Lata, Opinion, *The Unconventional Nature of Ethiopia’s May 15 Elections*, ADDIS FORTUNE, July 17, 2005 [hereinafter *Unconventional*].

<sup>150</sup> *Official Result*, *supra* note 141. For example, the Somali People’s Democratic Party won twenty-three seats, the Oromo Federalist Democratic Movement won eleven, the Benisgangel-Gumez People’s Democratic United Front received eight seats, as did the Afar National Democratic Party. *Id.*

<sup>151</sup> *See generally* The Oromo Liberation Front, <http://www.oromoliberationfront.org> (last visited Mar. 30, 2007); The Ogaden National Liberation Front, <http://www.onlf.org> (last visited Mar. 30, 2007).

Ottoman times,<sup>152</sup> and reached its pinnacle during the rule of Saddam Hussein and the pan-Arab nationalism of the Ba'ath party.<sup>153</sup>

### 1. *A Brief History of Discrimination in Iraq*

Iraq has experienced Arab Sunni preferment for centuries. The territory that constitutes the modern nation-state of Iraq was added to the lands of the Ottoman Empire in the sixteenth and seventeenth centuries.<sup>154</sup> Under Ottoman rule, the territory consisted of three separate provinces, centered around the cities of Basra, Baghdad, and Mosul.<sup>155</sup> Whether ruling through Mamluk governors or directly, the Ottoman leaders did not interfere with the local political and tribal structures, but instead chose to work with them.<sup>156</sup> Because the Ottomans followed the Sunni sect of Islam,<sup>157</sup> they gave preference to Sunni Arabs, who were given “leading positions in Iraq’s administration” although they were less than twenty percent of the total population.<sup>158</sup> During the First World War, the British gained control of the three Iraqi provinces, and with the fall of the Ottoman Empire and the division of its territory between France and England, these provinces were put into the British protectorate.<sup>159</sup> The British created both the state of Iraq and the Hashemite monarchy, which “preserved the dominant role of Iraq’s Arab Sunnis.”<sup>160</sup>

Although the British granted Iraq independence in 1932, they maintained a visible presence though regional military involvement, the continued existence of British companies, and British influence over the new monarchy.<sup>161</sup> The next decade witnessed instability and several coups before the re-entry of British troops in 1941.<sup>162</sup> The British-established Hashemite monarchy, such as it was, finally ended with the military coup d’etat of 1958, which began ten

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<sup>152</sup> See PHILLIPS, *supra* note 2, at 23.

<sup>153</sup> *Id.* at 145, 148.

<sup>154</sup> TRIPP, *supra* note 90, at 8.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 8–10, 19.

<sup>157</sup> Islam is divided into two major sects, the Sunni and the Shi’a. See JANE I. SMITH, *ISLAM IN AMERICA* 29 (1999). The division between the sects occurred in the earliest days of Islam because of disagreements as to who was the authentic successor to the Prophet Mohammed. *Id.* at 28–29. Shi’a believe that the succession follows the prophet’s lineage, and one of the defining events in their history was the massacre of Husayn, the grandson of the prophet, and his followers in Karbala, Iraq. *Id.* at 30.

<sup>158</sup> PHILLIPS, *supra* note 2, at 23; see also TRIPP, *supra* note 90, at 8–10.

<sup>159</sup> TRIPP, *supra* note 90, at 30, 32.

<sup>160</sup> PHILLIPS, *supra* note 2, at 23; see also TRIPP, *supra* note 90, at 143.

<sup>161</sup> TRIPP, *supra* note 90, at 74, 77.

<sup>162</sup> *Id.* at 81–108.

years of socialist authoritarian control.<sup>163</sup> The Ba'ath party first appeared in Iraq in 1951,<sup>164</sup> invoking pan-Arab nationalism and loyalty.<sup>165</sup> Arab nationalism and the Ba'ath party grew in Iraq during the ten years of the socialist republic,<sup>166</sup> and in July 1968, another military coup d'état resulted in a nominally Ba'athist regime.<sup>167</sup> Saddam Hussein grew in importance in the next decade, and by the time he grabbed the presidency in 1979, the change in title was a mere formality.<sup>168</sup>

The Ba'athism of Saddam Hussein “became a Stalinist instrument of control, repression, and subservience to the ruling elite.”<sup>169</sup> The dominance of Sunni Arabs in society was maintained with new cruelty. At the end of the first Gulf War, insurrections in both the Kurdish north and the Shi'ite south were quickly and viciously put down.<sup>170</sup> In the south of Iraq, approximately 200,000 Arab Shi'a died during this campaign, and in the north, 1.5 million Kurds became refugees, facing death by exposure while escaping to Turkey and Iran over the mountains.<sup>171</sup> The height of Saddam's anti-Kurdish campaign was the violence perpetrated by Saddam Hussein's cousin, nicknamed “Chemical Ali.”<sup>172</sup> He was in charge of the “systematic effort to exterminate the Kurds of northern Iraq,” which involved a chemical weapons attack and the deaths of an estimated 182,000 people.<sup>173</sup>

Iraq's interactions with the outside world were particularly disruptive during the Saddamist years. Through the 1980's Iraq engaged in war with Iran, and in 1991 Iraq's invasion of Kuwait led to international military intervention and the quick defeat of Iraqi forces.<sup>174</sup> During the next decade Iraq was subject to debilitating sanctions by the Security Council of the United Nations.<sup>175</sup> On March 20, 2003, U.S. forces invaded Iraq almost

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<sup>163</sup> *Id.* at 143, 148.

<sup>164</sup> WILLIAM R. POLK, UNDERSTANDING IRAQ 109 (2005).

<sup>165</sup> *Id.*

<sup>166</sup> TRIPP, *supra* note 90, at 149–92.

<sup>167</sup> *Id.* at 191–93.

<sup>168</sup> *Id.* at 193–222.

<sup>169</sup> PHILLIPS, *supra* note 2, at 145.

<sup>170</sup> *Id.* at 24.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 22.

<sup>173</sup> *Id.* at 23.

<sup>174</sup> *See generally* TRIPP, *supra* note 90, at 223–42, 253–55.

<sup>175</sup> POLK, *supra* note 164, at 157.

unilaterally.<sup>176</sup> Within a month Saddam's regime was toppled, but the violence continued.<sup>177</sup> The occupying American forces established both a transitional government and an interim constitution.<sup>178</sup>

As Iraq faced the prospect of creating a new nation out of the rubble of the fallen Saddam regime, a recurrent theme among the re-builders was the importance of ethnic and religious identity in Iraq. Faisal al-Istrabadi, a formerly exiled Iraqi academic involved in the constitutional drafting committee and current Iraqi ambassador to the United Nations,<sup>179</sup> said of Iraq before the drafting of the constitution:

Iraq is a country in which diversity is inherent in the social fabric, with a rich heritage of cultures languages and beliefs. Throughout recent Iraqi history, diversity has been seen as a liability and a divisive force and therefore every effort has been made to suppress it.<sup>180</sup>

In attempting to re-forge an Iraqi state, the problem of identity has been felt. Iraqis, "as a people, lack a strong sense of national identity."<sup>181</sup> The decentralized federal structure of the 2005 Iraqi Constitution is a reaction to decades of oppression under Saddam's regime.

## 2. *The 2005 Iraqi Constitution*

Under the new Constitution of Iraq, greater power rests in the regions and local units of government than in the central government. Unfortunately, much was left unresolved in an effort to create an instrument upon which all groups could agree. The allocation of power in pivotal areas remains vague. The new Iraq Constitution was passed by popular referendum on October 15, 2005.<sup>182</sup> The Constitution guarantees a federal, democratic, and parliamentary form of

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<sup>176</sup> *Id.* at 168–69. The invasion was ostensibly based on faulty intelligence that Saddam Hussein possessed weapons of mass destruction. *Id.*

<sup>177</sup> *Id.* at 170.

<sup>178</sup> *Id.* at 180–83.

<sup>179</sup> PHILLIPS, *supra* note 2, at 250.

<sup>180</sup> *Id.* at 52.

<sup>181</sup> *Id.* at 30. "Iraqis lack a sense of national identity. They are deeply divided along ethnic and sectarian lines. There is no tradition of participation in politics. Leadership has always been about power and force." *Id.* at 237.

<sup>182</sup> Steele, *supra* note 15, at 16. The constitution was broadly accepted by the governorates in which Shi'a and Kurds make up the majority, but in two of the three Sunni-majority governorates two-thirds of votes recorded were "no" votes. See Mutua, *supra* note 46, at 927. If one more of the governorates had recorded a two-thirds rejection, the constitution would have been vetoed. *See id.*

government.<sup>183</sup> Only one federal region was named in the Constitution, the region of Kurdistan; other regions may be formed by one or more governorates through referendum.<sup>184</sup> Analysts expected that this would lead to three main regions formed along religious and ethnic lines, consisting of the Kurdish region, an Arab Shi'a region in the south, and an Arab Sunni region in the middle of the country.<sup>185</sup>

The regions are to have executive, legislative, and judicial authority in all areas where power is not held exclusively by the federal government.<sup>186</sup> Powers exclusive to the Federal government include the powers of foreign policy, national security, fiscal policy, and control of water sources and their "fair distribution."<sup>187</sup> Whether the federal or regional governments will control Iraq's oil and gas resources is left ambiguous. The Constitution establishes two official languages, Kurdish and Arabic, but also grants all Iraqis the right to "educate their children in their mother tongue, such as Turkmen, Syriac and Armenian" in either government or private schools.<sup>188</sup>

Iraq's Constitution also establishes a parliamentary system.<sup>189</sup> There are two legislative houses, the Council of Representatives and the Federation Council.<sup>190</sup> The Council of Representatives is to be directly elected by the people, in such a way that all components of the people are represented, "at a ratio of one representative per 100,000 Iraqi persons representing the entire Iraqi people."<sup>191</sup> The Council of Representatives has the power to enact federal laws.<sup>192</sup> The approval and adjustment of the federal budget and the power to consent to a declaration of war or state of emergency are also functions of the Council of Representatives.<sup>193</sup> The Federation Council is composed of representatives of regions and all governorates that have not joined a region.<sup>194</sup> The Constitution does not enumerate the formation or

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<sup>183</sup> IRAQ CONST. art. 1 (2005).

<sup>184</sup> *Id.* arts. 116–18. Any group of one or more governorates may elect to form a region at the request of either one-third of the council members of a governorate or one-tenth of the voters of a governorate. *Id.* art. 118.

<sup>185</sup> Owen, *supra* note 20, at K11.

<sup>186</sup> IRAQ CONST. art. 120(1).

<sup>187</sup> *Id.* art. 109(1)-(3), (8). The control of oil and gas resources will be described more fully in Part V.B.

<sup>188</sup> *Id.* art. 4(1).

<sup>189</sup> *Id.* art. 1.

<sup>190</sup> *Id.* art. 48.

<sup>191</sup> *Id.* art. 49(1). Terms in the Council of Representatives are for four years. *Id.* art. 56(1).

<sup>192</sup> *Id.* art. 61(1).

<sup>193</sup> *Id.* arts. 60(9)(A), 61.

<sup>194</sup> *Id.* art. 64.

functions of the Federation Council, but leaves those particulars to the Council of Representatives:

A law, enacted by a two third majority of the members of the Council of [R]epresentatives, shall regulate the Federation Council formation, its membership conditions and its specializations and all that is connected with it.<sup>195</sup>

Allowing one branch of the legislature to determine the powers of the other branch will likely result in those powers being limited.

### 3. *The Government of Iraq Under the Constitution*

Since the election in December 2005, Iraq has plunged deeper and deeper into chaos, but the government has been formed and has been able to begin to negotiate some of the numerous ambiguities present in the Constitution. Overall, the Parliament has not addressed many of the tasks given it in the Constitution, but it has debated the need to amend the Constitution in certain areas, the possibility of the creation of additional regions, and the creation of a national oil law.

The first meeting of Parliament did not take place until March 16, 2006, three months after the national elections.<sup>196</sup> The delay was due to political deadlock over the formation of a government, and although the new Parliament was required by law to form a government and choose a president and Prime Minister within sixty days, intense negotiations were expected to continue.<sup>197</sup> Prime Minister Nouri al-Maliki, a Shi'ite Islamist, and a 40-member cabinet were approved by Parliament on May 20, 2006.<sup>198</sup> The new Prime Minister's stated goal was "national reconciliation."<sup>199</sup> Over the next several months, the government failed to address several of the tasks appointed to it by the Constitution, such as creating a committee that would propose amendments to the Constitution as required by Sunni parties, and passing a law establishing the means by which autonomous regions could be formed.<sup>200</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> John Ward Anderson & Omar Fekeiki, *Under Tight Security, Iraqi Parliament Meets for the First Time Following Three-Month Delay*, N.Y. SUN, Mar. 17, 2006, Foreign Section, at 7.

<sup>197</sup> *Id.*

<sup>198</sup> Dan Murphy, *Iraq's New Government Aims for Peace*, CHRISTIAN SCI. MONITOR, May 22, 2006, at 7.

<sup>199</sup> *Id.*

<sup>200</sup> Richard A. Oppel, Jr. & Abdul Razzaq al-Saiedi, *Deal That Won Sunni Backing of Iraq Constitution Sours*, N.Y. TIMES, Sept. 11, 2006, at A8.

The debate over the Constitution continued within the new government. Shi'a parties sought to push for the adoption of a law that would allow the creation of additional regions as supported by the Constitution.<sup>201</sup> Sunni parties sought to create a committee to amend the Constitution, arguing that the Constitution devolved too much power to the regions and did not provide for the fair distribution of wealth in the country.<sup>202</sup> Kurdish parties sought the establishment of a national oil law that would cement their ability to enter into lucrative oil contracts.<sup>203</sup> Although a draft oil law has been proposed, as of early 2007, no steps had been taken to form a committee to either amend the Constitution or establish a law regarding the formation of regions, which would allow the nine Shi'ite governorates in the south to form an autonomous region.<sup>204</sup>

The debate over what route should be taken continues, as the Iraqi Parliament fails to resolve the problems left unsolved in the Constitution. The idea of federalism in particular continues to be debated even after the passage of the Constitution. For example, the leader of the Shi'ite bloc in the Parliament, Sheik Abdul-Aziz al-Hakim, recently insisted that partitioning the region into autonomous regions along sectarian lines, as envisioned in the Constitution, would have a greater chance of stabilizing the region than the other options being proposed.<sup>205</sup> Federalism is criticized in the Sunni Arab community due to the uneven distribution of resources and wealth provided for in the Constitution.<sup>206</sup> Compromise may be reached by amending the constitution to provide a fairer standard and mechanism for distribution of wealth and, at the same time, means for the creation of a Shi'a region.<sup>207</sup>

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<sup>201</sup> *Partitioning Iraq*, *supra* note 23; *Ethnic Feuding Kills at Least 20 in Iraq*, LONDON FREE PRESS (Ontario), Sept. 25, 2006, at A3 [hereinafter *Ethnic Feuding*]; Amit R. Paley & K. I. Ibrahim, *Federalism Plan Dead, Says Iraqi Speaker; Sunni Legislators, Others Had Balked*, WASH. POST, Sept. 13, 2006, at A11.

<sup>202</sup> Anderson & Fekeiki, *supra* note 196, at 7; *Weekend Edition: Arab World Uneasy with Bush's New Iraq Plan* (NPR radio broadcast Jan. 14, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=6854124> [hereinafter *Arab World Uneasy*].

<sup>203</sup> James Glanz, *Draft Law Keeps Central Control Over Oil in Iraq*, N.Y. TIMES, Jan. 20, 2007, at A1; *Who Is to Control Kurdish Oil, and Protect It From Sabotage?*, ECONOMIST, Sept. 30, 2006, at A1.

<sup>204</sup> See Glanz, *supra* note 203, at A1; *Partitioning Iraq*, *supra* note 23.

<sup>205</sup> *Partitioning Iraq*, *supra* note 23.

<sup>206</sup> *Arab World Uneasy*, *supra* note 202.

<sup>207</sup> See generally *Ethnic Feuding*, *supra* note 201, at A3.



### III. POLITICAL RIGHTS AND THE REGIONS

The goal of an identity-based federal system is to bring the conflicts within a country into the structure of government, creating space for a political solution to those conflicts. In order for political solutions to be reached, there must be political participation by the disaffected ethnic groups. A constitution can facilitate political participation through guarantees of political liberty and freedom of association and forming political parties, as well as through emphasizing the rights of groups which have been politically excluded in the past.<sup>208</sup> The following sections elaborate the grant of political rights in the Ethiopian and Iraqi Constitutions.

#### A. *Ethiopia: Group Rights and Secession*

The goal of the pacification of disassociated ethnic groups sought in the federal model in the Ethiopian Constitution cannot be realized without broad protection of political freedoms allowing for the full participation of differing groups. Ethiopia's Constitution includes a broad array of political rights. Besides providing internationally recognized basic civil and political rights, the Constitution also provides for group rights.<sup>209</sup> The political rights of "Nations" in the Ethiopian Constitution are based on the right of self-determination and even include a specific right to secession.<sup>210</sup>

The Ethiopian Constitution provides a multitude of individual political rights and freedoms that mirror provisions of the International Covenant on Civil and Political Rights.<sup>211</sup> However, the central political freedoms, such as the freedom of expression, the freedom of association, and the right to assemble peacefully, are all subject to limitations. The freedom of expression includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice."<sup>212</sup> While the freedom of expression includes the "[p]rohibition of any form of censorship,"<sup>213</sup> the right of expression can be limited "to protect the well being of the youth, and the

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<sup>208</sup> Both the Ethiopian and Iraqi constitutions include the right of minority groups to have representation in the political decision-making process of the country. ETH. CONST. art. 54(1) (1994); IRAQ CONST. art. 49(1) (2005).

<sup>209</sup> ETH. CONST. art. 39.

<sup>210</sup> *Id.*

<sup>211</sup> *See generally* ICCPR, *supra* note 60.

<sup>212</sup> ETH. CONST. art. 29(2).

<sup>213</sup> *Id.* art. 29(4).

honour and reputation of individuals.”<sup>214</sup> Other limits on expression may be established so long as they are not based on “the content or effect of the point of view expressed.”<sup>215</sup>

The freedom of association is also subject to limitations. The right to be a member of “a political organization, labour union, [or] trade organization” is enshrined in the Constitution.<sup>216</sup> Additionally, the Constitution establishes a right “to freedom of association for any cause or purpose.”<sup>217</sup> However, organizations formed “in violation of appropriate laws” or for the purpose of “illegally subvert[ing] the constitutional order” are prohibited.<sup>218</sup> This limitation minimizes the right to freedom of association by allowing for “appropriate” laws to be established that would prohibit specific organizations. The right to assemble or demonstrate “peaceably and unarmed” can be limited as well, by regulations “made in the interest of public convenience” or “for the protection of democratic rights, public morality and peace during such a meeting or demonstration.”<sup>219</sup> Thus, although broad rights are listed in the Constitution, they are greatly limited by their terms.

The Ethiopian Constitution may be unique in the world in the degree to which it provides group rights. This emphasis on group rights is likely derived from the African Charter on Human and Peoples’ Rights,<sup>220</sup> which similarly places great emphasis on the rights of ethnic groups in addition to the rights of the individual.<sup>221</sup> The Ethiopian Constitution guarantees the rights of each “Nation, Nationality and People.”<sup>222</sup> The right of self-determination is emphasized throughout the Constitution, starting in the preamble, which begins as follows: “We, the Nations, Nationalities and Peoples of Ethiopia . . . in full and free exercise of our right to self-determination . . . .”<sup>223</sup> The principle of self-determination is enunciated again in Article 8 as part of the fundamental principles of the Constitution:

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<sup>214</sup> *Id.* art. 29(8).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* art. 38(5). The right to be a member of these organizations is contingent on the individual meeting “the special and general requirements stipulated by such organization.” *Id.*

<sup>217</sup> *Id.* art. 31.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* art. 30(1).

<sup>220</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217.

<sup>221</sup> *Id.* arts. 19–24; *see also* Henrard & Smis, *supra* note 53, at 43.

<sup>222</sup> ETH. CONST. art. 39.

<sup>223</sup> *Id.* pmb1.

1. All sovereign power resides in the nations, nationalities and peoples of Ethiopia.
2. This Constitution is an expression of their sovereignty.
3. Their sovereignty shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation.<sup>224</sup>

The concept of Ethiopia, as opposed to the structure of Ethiopia, is of a federation of ethnic groups, which may or may not align with regional states. The country is an amalgamation of the nations, nationalities and peoples of Ethiopia, who have joined together in a federal union. According to this formula, sovereignty remains with the nations, nationalities and peoples, not with either the central or regional governments.<sup>225</sup>

The definition of a “Nation, Nationality or People” provided in Article 39 of the Constitution combines the definition of group identity as primarily self-defined with several outwardly-determinable factors.<sup>226</sup> Article 39 reads as follows:

[A] group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.<sup>227</sup>

The definition of a “nation” within Ethiopia is not a regional state. Besides the primary group, each region includes many very small groups that do not have a region of their own.<sup>228</sup> Some suggest that the decision to give the right to each “Nation, Nationality, and People,” as opposed to the regions, was to make the act of secession more difficult.<sup>229</sup>

The substance of the right to self-determination is two-fold. Generally, the right to self-determination is the right “to a full measure of self-government that includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in State and Federal governments.”<sup>230</sup> The right to self-determination in the Ethiopian Constitution

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<sup>224</sup> *Id.* art. 8.

<sup>225</sup> *See generally id.*

<sup>226</sup> *Id.* art. 39(10).

<sup>227</sup> *Id.*

<sup>228</sup> *See* Abbink, *supra* note 115, at 167.

<sup>229</sup> *Id.*

<sup>230</sup> ETH. CONST. art. 39(3).

also includes the right to secede—“Nations” have a particularized right to leave the country if certain steps are taken.<sup>231</sup> The right of secession for the nations of Ethiopia is part of the “unconditional right to self-determination . . . .”<sup>232</sup> The Constitution lays out with particularity the technical process for legal secession.<sup>233</sup> The first step to secession is a demand approved by a “two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned.”<sup>234</sup> Within three years of the demand, the federal government is obligated to organize a referendum, and if the majority votes for independence, then the federal government will transfer its powers to the council of the seceding Nation and divide up relevant assets.<sup>235</sup>

At the time of the writing of the Ethiopian Constitution, the insertion of a constitutional mechanism allowing for secession received some criticism. The argument offered for its inclusion was that allowing a mechanism for secession would defuse ethnic discontent rather than stimulate it.<sup>236</sup> Even opponents of the article agreed that its inclusion would “make its exercise less likely and less violent.”<sup>237</sup> Generally, this principle has proven to be true, as initial fears regarding the new Constitution and its use of ethnicity have not been realized by acts of secession.<sup>238</sup>

#### *B. Iraq: Unified Vision, Decentralized Reality*

Unlike the Ethiopian Constitution, the theme of the Iraqi Constitution is unity, rather than an emphasis on the sects within Iraqi society. However, the Iraqi Constitution provides for much greater autonomy of the regions than the Ethiopian Constitution. This section addresses political rights granted by the Constitution and the rights of the regions in Iraq’s federal system.

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<sup>231</sup> *Id.* art. 39(4).

<sup>232</sup> *Id.* art. 39(1).

<sup>233</sup> *Id.* art. 39.

<sup>234</sup> *Id.* art. 39(5).

<sup>235</sup> *Id.* art. 39(6)-(9).

<sup>236</sup> T.S. Twibell, *Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution’s Ability to Overcome Ethiopia’s Problems*, 21 LOY. L.A. INT’L & COMP. L. REV. 399, 458 (1999).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 432–33. The Eritrean situation can be described as unique, as Eritrea had been a separate Italian colony, used by Italy to “police” Ethiopia. *Id.* at 432–33, 454. Eritrea became a part of Ethiopia in 1962, which was viewed by Eritreans as imperialist expansion. Keller, *supra* note 96, at 97. This view was bolstered by Ethiopia’s restriction of Eritrean political rights, such as the disbanding of political parties upon annexation. *Id.*

The Iraqi Constitution provides for a variety of individual political rights and freedoms. Iraqi citizens, both “men and women” have the right to “participate in public affairs” and “to voting, election, and nomination.”<sup>239</sup> Freedom of thought is safeguarded, in that “[t]he State shall guarantee protection of the individual from intellectual, political and religious coercion.”<sup>240</sup> Freedom of expression, of the press, and of assembly and peaceful demonstration are guaranteed, but only to the extent that they do not “violate public order and morality.”<sup>241</sup> Freedom of association is guaranteed through both the guarantee of “freedom to form and join associations and political parties”<sup>242</sup> and the prohibition against forcing “any person to join any party, society or political entity or . . . to continue his membership in it.”<sup>243</sup>

Despite the strongly decentralized government created by the Iraqi Constitution, its preamble provides the following unifying vision of Iraq: “[W]e sought hand in hand and shoulder to shoulder to create our new Iraq, the Iraq of the future, free from sectarianism, racism, locality complex, discrimination and exclusion.”<sup>244</sup> Aside from the powers given to regional governments, the Constitution grants broad rights to minority groups in Article 125, stating that the “Constitution shall guarantee the administrative, political, cultural and educational rights for the various nationalities, such as Turkmen, Caldeans, Assyrians and all other components.”<sup>245</sup> Each governorate or local unit of administration that is not incorporated into a federal region is to have broad authority in the areas of finance and administration “to enable it to manage its affairs in accordance with the principle of decentralized administration” and specifically will “have an independent finance.”<sup>246</sup> In November 2006, the Iraqi Prime Minister provided the governors and governorate councils with a report on the powers and internal structure of the governorates, which have not yet been well-defined by legislation.<sup>247</sup>

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<sup>239</sup> IRAQ CONST. art. 20 (2005).

<sup>240</sup> *Id.* art. 37(2).

<sup>241</sup> *Id.* art. 38.

<sup>242</sup> *Id.* art. 39(1).

<sup>243</sup> *Id.* art. 39(2).

<sup>244</sup> *Id.* pmb1.

<sup>245</sup> *Id.* art. 124.

<sup>246</sup> *Id.* art. 121(2), (5).

<sup>247</sup> *Iraqi Premier Outlines Powers of Governors, Governorate Councils*, AL-SABAH (Iraq), Nov. 14, 2006, reprinted in *BBC Monitoring International Reports*. The Prime Minister also stressed that the limitation of the powers of governorates by the Emergency Law was meant to be temporary, as a necessary measure to deal with current security needs. *Id.*

Under the Iraqi Constitution, the regions in Iraq have unprecedented power. According to Article 109, the federal government has exclusive authority only in the following areas: foreign policy, diplomatic and trade relations, national security and the defense of Iraq's borders, fiscal policy and the national budget, regulating inter-regional commerce, citizenship and residency, telecommunications and mail, drawing up the budget, water sources from outside Iraq, population statistics, and weights and measures.<sup>248</sup> Outside these areas, regional legislation is considered superior to federal legislation in case of a conflict, giving the regions enormous power, considering the limited number of exclusively held federal powers in the Constitution.<sup>249</sup> One notably absent power of the central government is the power to impose taxes.<sup>250</sup> Additionally, the central government has very limited police power. Its exclusive national security power is limited to protection of Iraq from outside dangers and protection of the borders, leaving the regions free to create their own "police, security forces and guards of the region."<sup>251</sup>

#### IV. RIGHTS OF MINORITIES IN THE REGIONS

The traditional understanding of federalism identifies the central government as the protector of citizens and minority groups from potential rights abuses by state or regional governments.<sup>252</sup> This perspective argues that regions, as compared to the central government, have a greater tendency to ignore the rights of minorities within their borders.<sup>253</sup> The alternate perspective is that judicial federalism, the protection of rights by *regional* governments and courts, would instead result in expanded regional rights in areas where the federal government or judiciary is not able to reach consensus.<sup>254</sup> Federalism is established in a country to give local units

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<sup>248</sup> IRAQ CONST. art. 109.

<sup>249</sup> *Id.* arts. 114, 120(2).

<sup>250</sup> See Galbraith, *supra* note 23, at 28.

<sup>251</sup> IRAQ CONST. arts. 109(2), 120(5).

<sup>252</sup> Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 737 (2003).

<sup>253</sup> *Id.*; see also Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1245 (1997) (stating that the federal government can "protect the liberties of a minority from the prejudices and abuses of a hostile majority"). The definition of a minority is generally a group that is "numerically smaller, non-dominant group distinguished by shared ethnic, racial, religious, or linguistic attributes." Mutua, *supra* note 46, at 928–29.

<sup>254</sup> DAVID L. SCHAPIRO, *FEDERALISM, A DIALOGUE* 95 (1995); see also Clark, *supra* note 252, at 723–26 (describing the struggles of the progressive citizenry of Washington, D.C. to lift the prohibition of gay sex and create domestic partnership laws due to the interference of a less progressive Congress).

autonomy, “to protect individual liberties against abuse of power by a strong national government.”<sup>255</sup> As such, it only makes sense that regions or states would provide additional rights for their citizens against the federal government.<sup>256</sup> In ethnic-based federal systems, each region will generally consist of a majority from one ethnic group and small minorities from other ethnic groups.<sup>257</sup> While the federal government may be more inclined to protect the rights of the minorities within the regions, the regions themselves are much more likely to protect the rights of the majorities within their borders, which are generally minorities in the country.

One fear regarding ethnic-based federal systems is that entirely different legal systems will emerge in different regions of the country or that the central government will follow one legal tradition and the regions will follow entirely different traditions.<sup>258</sup> It is not uncommon for multiple legal traditions to exist side-by-side in one country. Many majority-Muslim countries employ common law or civil law generally, but use the system of Shari’a in the area of family law.<sup>259</sup> The use of a particular legal system may be integrally tied to a group’s concept of self-determination, especially when the system has ties to the religious identity of the group, as in the case of the Islamic Shari’a.<sup>260</sup> In allowing for regional self-determination, the freedom to adopt different legal systems can be considered an integral element of regional autonomy.

The problem of legal pluralism would seem to support the assertion that the central government is the correct protector of rights in a legally diverse federal system. However, in places that have experienced oppressive central regimes, the greater fear is that the central government will continue to restrict the rights of citizens. Regional courts and regional governments may also take an important role in the protection of rights.<sup>261</sup> The best model in an ethnic federal state allows for both the regions and the central government to take the role of protecting rights, engaging in a productive exchange of ideas and views

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<sup>255</sup> Adler, *supra* note 253, at 1233.

<sup>256</sup> See generally Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 223 (2003).

<sup>257</sup> Selassie, *supra* note 30, at 90.

<sup>258</sup> See generally Dolores A. Donovan & Getachew Assefa, *Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism*, 51 AM. J. COMP. L. 505, 505 (2003).

<sup>259</sup> See generally SHARIFAH SUHANA AHMAD, MALAYSIAN LEGAL SYSTEM 108 (1999) (describing the Malaysian legal system, a federal system in which the state courts are Shari’a courts, which have jurisdiction over matters regarding personal status of Muslims within the state).

<sup>260</sup> See generally Owen, *supra* note 20, at K11.

<sup>261</sup> See Williams, *supra* note 256, at 223.

on what the rights of citizens should be.<sup>262</sup> Especially in the area of religious protection, such “interactive federalism” may be able to reach better levels of protection than either the federal or regional government acting alone.<sup>263</sup>

The Ethiopian government has a poor human rights record, which vastly outweighs the problems of human rights observance under regional law.<sup>264</sup> The regions in Ethiopia do not have sufficient autonomy to act to protect their citizens from the central government. The future of the Iraqi human rights situation is yet unknown, but it is possible that a conservative version of the Shari’a may be enacted at either a regional level in a Shi’a state, or at the national level, in which there is not quite a Shi’a majority. If such were to happen, it is possible that either the federal Constitution’s strong human rights standards would prevent the implementation of draconian laws at the regional level, or that the other regions would at least be able to prevent the implementation of harsh laws within their territory.

#### *A. Ethiopia: Human Rights at Neither Level*

Ethiopia is a signatory to all of the major human rights instruments, besides providing protections for human rights within the federal Constitution.<sup>265</sup> However, the country’s poor human rights record was well confirmed by the government’s oppressive acts following the 2005 national elections.<sup>266</sup> Ethiopia has experienced some effects of legal diversity and the potential for minority abuse in its regions.<sup>267</sup> While there may be some cause for the federal government to interfere in regional practices, the overwhelming majority of abuses are committed by the central government against the people. In Ethiopia, the trend of federal abuse of rights necessitates greater involvement by the regional governments and courts in the protection of the rights of their citizens.

The Ethiopian Constitution recognizes a broad span of rights. The Constitution affirms that human rights are “inalienable” and “shall be

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<sup>262</sup> See generally *id.*

<sup>263</sup> Robert A. Schapiro, *Interactive Federalism: Filling the Gaps? From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 12–13 (2006).

<sup>264</sup> See *infra* text accompanying note 290.

<sup>265</sup> See Website of the Office of the High Comm’r for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/countries/ratification/index.htm> (last visited Mar. 30, 2007).

<sup>266</sup> See *infra* Part VI.A.

<sup>267</sup> Kefale, *supra* note 8, at 266.



respected.”<sup>268</sup> In addition to the Constitution, the law of the land is to include “all international agreements ratified by Ethiopia . . . .”<sup>269</sup> Article 13 lists several of these instruments, stating that the rights enumerated in the Constitution are to be “interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.”<sup>270</sup> Additionally, the prohibition of discrimination stated in Article 25 specifically addresses discrimination on the basis of gender.<sup>271</sup> Furthermore, the rights of women are enumerated in Article 35, which provides equal rights in marriage, entitlement to affirmative action in order to combat the legacy of discrimination, and equal rights in inheritance.<sup>272</sup> These are merely an example of some of the rights provided in the Constitution.

In order to respect human rights, the Ethiopian federal government is obligated to counter discriminatory or harmful customary practices while still respecting the customary law systems that function within the country’s borders.<sup>273</sup> Ethiopia allows for some degree of freedom for the practice of religious or customary law.<sup>274</sup> The Ethiopian Constitution explicitly states that there “shall be no state religion”<sup>275</sup> and emphasizes that “[t]he State shall not interfere in religious affairs and religion shall not interfere in state affairs.”<sup>276</sup> However, the role of religion is not precluded from official recognition in the area of the law of personal status:

This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.<sup>277</sup>

Laws may be established that in particular recognize marriages that are “concluded under systems of religious or customary laws . . . .”<sup>278</sup> More broadly, the Constitution states that either the federal or state government “can

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<sup>268</sup> ETH. CONST. art. 10(1)-(2) (1994).

<sup>269</sup> *Id.* art. 9(4).

<sup>270</sup> ETH. CONST. art. 13(2).

<sup>271</sup> *Id.* art. 25.

<sup>272</sup> *Id.* art. 35(2)-(3), (6).

<sup>273</sup> Donovan & Assefa, *supra* note 258, at 505.

<sup>274</sup> *Id.*

<sup>275</sup> ETH. CONST. art. 11(2).

<sup>276</sup> *Id.* art. 11(3).

<sup>277</sup> *Id.* art. 34(5).

<sup>278</sup> *Id.* art. 34(4).

establish or give official recognition to religious and customary courts.”<sup>279</sup> Ethiopia is home to many traditional modes of governance. There are multiple examples of local participatory democracies that are a part of rural cultures, such as the Oromo Gada system and the system of Sera among southern groups and the Gurage.<sup>280</sup> In all, there are more than sixty customary law systems, and the Constitution allows for the preservation of these systems.<sup>281</sup> However, if such customary law systems violate the human rights standards set out in the Constitution or international human rights instruments, the federal government should interfere to prevent the abuse.

The Constitution recognizes rights of minorities in Ethiopia through a liberal grant of language rights. Due to the history of linguistic oppression in Ethiopia, the choice of a national language was of importance in crafting a new constitution. The conflict was diffused by giving one language, Amharic, precedence, but still recognizing the many other languages of Ethiopia.<sup>282</sup> Only sixty percent of the population knows Amharic, so providing for the use of other languages at the more local level was also a practical decision, to enable local governments to conduct their affairs in a language accessible to their population.<sup>283</sup> In the regions and smaller units, there is freedom for the various ethno-linguistic groups “to use their own languages for education and self-administration.”<sup>284</sup> The importance of this right to use one’s own language cannot be underestimated, because under past regimes the restriction of language was “one of the factors that created profound alienation for ethnic groups for whom the dominant culture-*cum*-language was not their own.”<sup>285</sup>

One of the fears regarding ethnic-based systems is that minority rights will not be protected, and that each region will overtly favor the majority ethnic group to the detriment of all others. As should be expected, “[n]o Ethiopian region or regional state as such is completely inhabited by one linguistic or ethnic group.”<sup>286</sup> Because of the broad protection of rights in the Constitution, the federal government is obliged to protect the rights of minorities and prevent state discrimination or violations of constitutional or international

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<sup>279</sup> *Id.* art. 78(5).

<sup>280</sup> Bahru Zewde, *Introduction to ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW* 7, 11–12 (Bahru Zewde & Sigfried Pausewang eds., 2002).

<sup>281</sup> Donovan & Assefa, *supra* note 258, at 505.

<sup>282</sup> Twibell, *supra* note 236, at 452; *see also* ETH. CONST. art. 5.

<sup>283</sup> Twibell, *supra* note 236, at 452.

<sup>284</sup> Kefale, *supra* note 8, at 261; *see also* ETH. CONST. art. 5(3).

<sup>285</sup> Habtu, *supra* note 17, at 103.

<sup>286</sup> Kefale, *supra* note 8, at 265; *see also* Habtu, *supra* note 17, at 110.

human rights.<sup>287</sup> One example of a discriminatory practice in some regional states is the requirement that to run for public office one must have “knowledge of the regional languages.”<sup>288</sup> This language requirement is in violation of the prohibitions against discrimination enshrined in the Constitution.<sup>289</sup>

While such violations of the Constitution by the implementation of a discriminatory regional legal system or language requirement might call for federal action, there is reason for states to fear greater federal interference. The human rights monitoring group, Human Rights Watch, has issued many reports regarding the 2005 Ethiopian elections and post-election violence that confront the government’s use of “intimidation, arbitrary detentions and excessive force in rural areas of Ethiopia to suppress post-election protests and all potential dissent.”<sup>290</sup> While the federal government may have reason to act to prevent the abuse of rights in the regions, the regional governments and courts of Ethiopia should also take on an important role in addressing human rights concerns on the national level by protecting individuals against the actions of agents of the federal government in the regions.

### *B. Iraq: The Role of Islam*

One important question in the drafting of the new Constitution of Iraq was the role Islam and the Shari’a would play in law and government.<sup>291</sup> The ambiguous position of Islam and the Shari’a under the Constitution has left open the question of whether an Islamic government or Islamic law will be established either at the federal or regional level, and whether a liberal or conservative version would be adopted.<sup>292</sup> If a conservative version of the Shari’a is established in a new federal region of Iraq, the federal government

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<sup>287</sup> See generally ETH. CONST. art. 13(1).

<sup>288</sup> Kefale, *supra* note 8, at 266.

<sup>289</sup> *Id.*; see also ETH. CONST. art. 25.

<sup>290</sup> HUMAN RIGHTS WATCH, ETHIOPIA: HIDDEN CRACKDOWN IN RURAL AREAS (2005), available at <http://hrw.org/english/docs/2006/01/12/ethiop12417.htm>; see also HUMAN RIGHTS WATCH, SUPPRESSING DISSENT: HUMAN RIGHTS ABUSES AND POLITICAL REPRESSION IN ETHIOPIA’S OROMIA REGION 12–39 (2005), available at <http://hrw.org/reports/2005/ethiopia0505/ethiopia0505.pdf>.

<sup>291</sup> See Pub. Law & Pol’y Group, Report, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 54 (2004). The Shari’a, or Islamic Law, is a system of law based on the religious texts of Islam and the writings of jurists, and has developed over the centuries into a complex and comprehensive legal system. See generally Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 1–3 (2005). For a discussion of the main ethnic and religious divisions in Iraq, see Mutua, *supra* note 46, at 932.

<sup>292</sup> See Makiya, *supra* note 95, at WK13.

could potentially act to protect the rights of citizens within that region. With strong regions in Iraq, the reverse may also occur; regions could protect the rights of their citizens if the federal government adopts a conservative interpretation of the Shari'a.

The Iraqi Constitution contains an unhappy tension between the establishment of Islam as the "official religion" and a "fundamental source of legislation" and liberal rights and freedoms.<sup>293</sup> Article 2 of the Constitution establishes a set of higher law that no law in Iraq may contradict. The first part of Article 2 reads as follows:

Islam is the official religion of the State and it is a fundamental source of legislation:

- A. No law that contradicts the established provisions of Islam may be established.
- B. No law that contradicts the principles of democracy may be established.
- C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.<sup>294</sup>

An obvious question is what happens when two or more of these principles contradict each other—a question left vaguely open. One of the rights stipulated in the Constitution is the right to be "equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, sect, belief or opinion, or economic and social status."<sup>295</sup> At the same time, the establishment of Shari'a Courts for matters of personal status is implicitly approved in the Constitution: "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices . . . ."<sup>296</sup>

The regional constitutions may freely define the structure of their government, "provided that it does not contradict with this Constitution."<sup>297</sup>

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<sup>293</sup> *Id.* art. 2(1).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* art. 14.

<sup>296</sup> *Id.* art. 41. Furthermore, the composition of the Federal Supreme Court is to include "experts in Islamic jurisprudence." *Id.* art. 91(2). Before the enactment of the Constitution, the Interim Governing Council had extended the application of the 1959 Family Code, which contained a very progressive version of the Shari'a on matters of personal status, but was considered to have departed from acceptable interpretations of Islamic law. See Khawam, *supra* note 44, at 751.

<sup>297</sup> IRAQ CONST. art. 119. There is an implicit contradiction between the right of a region to establish an institution such as Shari'a courts, and the rights of minorities in the region whose constitutional rights could then be violated by that institution through discrimination based on a prohibited category, such as gender or religion. See Khawam, *supra* note 44, at 719.

Regions “have the right to exercise executive, legislative and judicial authority” in all matters not within the exclusive powers of the federal government.<sup>298</sup> If the matter is not within the exclusive power of the federal government, the regions may reject the application of those laws within their territory:

In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government, the regional authority shall have the right to amend the application of the national legislation within that region.<sup>299</sup>

While the federal Constitution has primacy over the regional constitutions, federal legislation, except on matters within the exclusive power of the federal government, may be negated within any region by legislation.<sup>300</sup> This article provides a mechanism by which Iraqi states may resist the implementation of objectionable federal laws. In the alternative, the federal government would also have a mechanism for resisting the implementation of objectionable regional laws. While the Parliament and the Prime Minister would only have limited ability to interfere in the decisions of a Regional government, Iraq’s Federal Supreme Court could potentially invalidate regional legislation that violates rights provided by the federal Constitution.<sup>301</sup> According to Article 93, the “[d]ecisions of the Federal Supreme Court are final and binding for all authorities.”<sup>302</sup>

An expected result of the federal system is the development of “markedly different systems of law” in the Kurdish, Shi’a, and Arab Sunni regions of Iraq.<sup>303</sup> One of the major challenges will be how to protect the rights of individuals in these different systems through national rights. A possible outcome of this balance is the development of liberal versions of the Shari’a in the regions of Iraq that comport with human rights and democratic values.<sup>304</sup> In order for that to succeed, the rights and freedoms enshrined in the federal Constitution must be upheld by the federal government and the federal

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<sup>298</sup> IRAQ CONST. art. 120(1).

<sup>299</sup> *Id.* art. 120(2).

<sup>300</sup> *Id.*

<sup>301</sup> *See id.* arts. 2, 92. The rights and freedoms that are part of the federal Constitution do not require legislation to be implemented.

<sup>302</sup> *Id.* art. 93.

<sup>303</sup> Owen, *supra* note 20, at K11.

<sup>304</sup> Feldman, *supra* note 291, at 1–2 (describing the expression of Islamic democratic values in the constitutional fatwa issued by Ayatollah ‘Ali Sistani calling for an elected constitutional commission in Iraq). *See generally* Pub. Law & Pol’y Group, *supra* note 291.

judiciary. However, the strength given to regions in Iraq may also allow for the opposite situation, in which a more liberal state may prevent a conservative central government from imposing a restrictive version of the Shari'a on the whole of the population. Repressive or draconian legislation might be restricted in its application within a region.

## V. POWER-SHARING AND FISCAL FEDERALISM

Any federal system must address how resources are to be shared between regional and central governments. Fiscal federalism is an issue that any federal form of government must face, but it is especially important in an ethnic federal system because of the importance of the independent finance of the regions to the viability of the federal structure.<sup>305</sup> The autonomy granted to ethnic groups within a nation will not result in real autonomy without the ability of states to have some degree of financial independence.<sup>306</sup> Allowing the federal government to monopolize fiscal power prevents any real decentralization of power because whoever holds the checkbook holds the power of deciding policy.

The regions have very little power over their finances in Ethiopia and, being reliant on the federal government, are required to implement its policies.<sup>307</sup> Analysts fear that the Iraqi Constitution has granted too much control to the regions, and that by giving a large amount of the control of national resources to the regions, the federal government will be powerless to control the national policy of the country and retain a check on regional power.<sup>308</sup> Since decentralization of fiscal power is necessary for a region to have any real autonomy, the liberal grant of fiscal power in the Iraqi Constitution may not be necessarily problematic for the success of the federal structure. The greater danger to the success of the new government is the inequality between the regions in the constitutional grant of fiscal power.

### A. *Ethiopia: Fiscal Power in Federal Hands*

While the Ethiopian Constitution calls for the financial independence of regions and smaller units of government, it does not provide the structure in

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<sup>305</sup> See Super, *supra* note 6, at 2598.

<sup>306</sup> See Adler, *supra* note 253, at 1232–36. “[A]utonomy serves as a check to protect individual liberties against abuse of power by a strong national government.” *Id.* at 1233; see also Jimenez, *supra* note 18, at 23.

<sup>307</sup> See *infra* Part V.A.

<sup>308</sup> See *infra* Part V.B.

which such independence is possible. The central government controls the allocation of federal funds to the regions. The result has been extreme dependence by regions on the central government for funding.

The Ethiopian Constitution divides taxation power between the federal and state governments,<sup>309</sup> with the overall purpose that “[t]he Federal government and the States shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law.”<sup>310</sup> The federal “[g]overnment has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.”<sup>311</sup> The power to divide finance between the federal government and states belongs to the federal House of Federation: “It shall determine the division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the States.”<sup>312</sup> Concurrent taxation powers of federal and state government include the power to collect taxes from “large-scale mining and all petroleum and gas operations . . . .”<sup>313</sup> Although the Constitution gives control to the House of Federation, which consists of representatives of the regions, giving power to any unit of the federal government takes the power from the regions. In a true situation of the dictatorship of the majority, whichever group controls the federal government now effectively controls the financial freedom of the regions.

Besides this vague division of taxation powers, the Constitution allows for federally-collected funds to flow to state governments at the will of the federal government:

The Federal Government may grant to States emergency, rehabilitation and development assistance and loans, due care being taken that such assistance and loans do not hinder the proportionate development of States. The Federal Government shall have the power to audit and inspect the proportionate development of States.<sup>314</sup>

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<sup>309</sup> ETH. CONST. arts. 96–98 (1994).

<sup>310</sup> *Id.* art. 94(1).

<sup>311</sup> *Id.* art. 89(5).

<sup>312</sup> *Id.* art. 62(7).

<sup>313</sup> *Id.* art. 98(3).

<sup>314</sup> *Id.* art. 94(2).

The House of Federation has the power to determine and grant “the subsidies that the Federal Government may provide to the States.”<sup>315</sup> Although financial affairs are meant to be decentralized in Ethiopia, that has not yet happened and thus the regions are dependent on the central government for funding.<sup>316</sup> One cause of this dependence is that the federal government has chosen to reserve to itself the right to tax the most lucrative sectors.<sup>317</sup> While most taxation power rests with the central government, most spending obligations rest in the local government.<sup>318</sup> Although the Constitution gives great administrative authority to the states, power remains in the central government.<sup>319</sup> The federal Ministry of Finance oversees the financial affairs of the regions.<sup>320</sup> One scholar has described the ethnic federalism of Ethiopia as an “authoritarian ethnic federalism” because of the tight control of the central authorities on local administration.<sup>321</sup>

Another reason for the lack of fiscal independence is mismanagement at the regional level caused by corruption and a lack of capacity such as strong infrastructure and trained personnel.<sup>322</sup> The lack of institutional and administrative capacity and trained personnel have had a negative effect on the ability of the Ethiopian regions to obtain the objectives of self-governance, control of budgets, and management of development.<sup>323</sup>

Even aside from the administrative capacity of the regional governments, there is an imbalance in regard to resources among the federal regions, translating into great disparities between regional states in regard to wealth collected.<sup>324</sup> The capital of Addis Ababa collects the largest amount of revenue of any region and retains fiscal independence, but by comparison the states of Gambella and Benishangul-Gumuz are only able to self-finance ten percent of their budget.<sup>325</sup> A large issue in the sharing of fiscal resources in the Ethiopian context is the country’s abject poverty. Ethiopia receives one billion U.S. dollars per year in aid, not including food aid, and is seventh from the

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<sup>315</sup> *Id.* art. 62(7).

<sup>316</sup> *See* Kefale, *supra* note 8, at 267–69.

<sup>317</sup> *Id.* at 268.

<sup>318</sup> *See* Keller, *supra* note 96, at 108.

<sup>319</sup> *Id.*

<sup>320</sup> *See* Habtu, *supra* note 17, at 104.

<sup>321</sup> Ayenew, *supra* note 145, at 137.

<sup>322</sup> Kefale, *supra* note 8, at 267–69.

<sup>323</sup> Ayenew, *supra* note 145, at 130.

<sup>324</sup> *See* Keller, *supra* note 96, at 109–11.

<sup>325</sup> *See id.* at 111.



bottom of the United Nations Human Development Index ranking.<sup>326</sup> With only discretionary granting of federal funds to the regions, financial independence of regional governments and the corresponding autonomy is simply not possible. Without fiscal independence, the central government will be free to continue to exercise control over the regions due to their financial need.

### *B. Iraq: Fiscal Power in Regional Hands*

The Iraqi Constitution is ambiguous as to the control of the country's income as divided between the central and regional governments. Oil, the main resource that is expected to be the primary source of income for the country, is neither clearly the property of the regions nor of the federal government. The vague principles which are set down in the Constitution regarding ownership of resources indicate that it is likely that the division of wealth will not be equal between the regions in Iraq, although it is more likely that a larger portion of wealth will be held by the regions than in the case of Ethiopia.

The nebulous general principle of fiscal policy enunciated in the Constitution is that each region be allotted an "equitable share:"

Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge its responsibilities and duties, but having regard to its resources, needs and the percentage of its population.<sup>327</sup>

On the issue of oil, the division of power and rights to the resource is unclearly defined. The general principle regarding oil and gas wealth is that they are "the ownership of all the people of Iraq in all the regions and governorates."<sup>328</sup> There are two separate schemes regarding ownership of oil wealth: one scheme governs current oil fields, another scheme governs future oil fields.

The federal government, along with the producing governorates, has control over the management of current oil fields and is required to distribute the revenues "in a fair manner."<sup>329</sup> Article 111 defines what is meant by "fair:"

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<sup>326</sup> *A Taste of Democracy*, ECONOMIST, May 21, 2005, at 48.

<sup>327</sup> IRAQ CONST. art. 120(3) (2005).

<sup>328</sup> *Id.* art. 110.

<sup>329</sup> *Id.* art. 111(1).

[I]n a fair manner in proportion to the population distribution in all parts of the country with a set allotment for a set time for the damaged regions that were unjustly deprived by the former regime and the regions that were damaged later on, and in a way that assures balanced development in different areas of the country . . . .<sup>330</sup>

Thus, in the distribution of oil revenues from current oil fields, preference is to be given to the predominantly Shi'a southern region and the predominantly Kurdish north to compensate for the hardship suffered under Saddam's regime. Or, put differently, this decision essentially profits the oil-rich regions of Iraqi Kurdistan and the Shi'a south, while "penalizing" the Sunni Arabs who have held political power in the past but sit on resource-poor desert.<sup>331</sup> The areas damaged "afterwards" could potentially be a reference to the Sunni areas harder hit during the U.S. invasion and occupation. The control of future oilfields and the division of the income derived from them is more ambiguous. Article 112(2) provides:

The federal government with the producing regional and governorate governments shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.<sup>332</sup>

The policies shall be formed between the federal government and the regions in which there is oil, presumptively giving increased benefits from oil income to those regions against the other regions. However, this Article says nothing concrete regarding ownership of the income from undeveloped oil fields.

The power implicitly given to the regions in the grant of oil revenues from all new oil and gas exploration is expected to be a large hurdle for the new Iraq.<sup>333</sup> The recurrent recommendation of analysts and commentators has been that oil revenues be "declared the property of the central government, not the provinces."<sup>334</sup> In a resource-rich country like Iraq, the revenues from oil are one of the only large sources of funding for the country.<sup>335</sup> While some appropriate scheme should be established whereby they are split equitably

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<sup>330</sup> *Id.*

<sup>331</sup> See Makiya, *supra* note 95, at WK13.

<sup>332</sup> IRAQ CONST. art. 111(2).

<sup>333</sup> See Makiya, *supra* note 95, at WK13.

<sup>334</sup> Wesley K. Clark, *The Next Iraq Offensive*, N.Y. TIMES, Dec. 6, 2005, at A27; see Makiya, *supra* note 95, at WK13; Trudy Rubin, *Iraq's Critical Election*, RECORD, Dec. 14, 2005, at 2 (suggesting simply that the constitution be re-written to give Sunni Arabs "a fair share" of the oil wealth of the country).

<sup>335</sup> See generally Makiya, *supra* note 95, at WK13.

between the regions, such revenue should be transferred to the regional government with “no strings attached.” If Iraq follows the Ethiopian experience, the greater problem will not be granting too much control over oil recourses to the regions, but the vague nature of the grant, which creates a potential for the monopolization of oil income by the central government.

One important piece of legislation that the Iraqi Parliament has been working towards since the government was formed is the Oil Law.<sup>336</sup> This law would clarify the relationship between the regions and the federal government in the ownership and control of oil wealth.<sup>337</sup> However, disagreements between the groups in Iraq over the division of power and control have held up the bill. The Sunni Arab block wants the central government to control the whole process of negotiating exploration and development contracts, fearing that without central government control they would not receive a fair share of the oil wealth.<sup>338</sup> The Shi’a Arab block would like contracts to be negotiated by regional governments, but agree that the contracts should be subject to review by the central government.<sup>339</sup> The Kurdish representatives want the regions to have full powers and the final word on negotiating and signing contracts.<sup>340</sup> The draft oil law that was agreed upon by a committee in January 2007 adopts a central position, giving regions the ability to initiate negotiations on contracts which must be sent to a committee in the central government which has only the power to reject contracts that do not meet specific criteria.<sup>341</sup> In addition, the central government would have a pre-approved list of companies with which regions may negotiate oil contracts.<sup>342</sup> The committee took months to agree upon the draft law, and the process of enacting oil legislation will also not happen quickly.<sup>343</sup>

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<sup>336</sup> Edward Wong, *Iraqi Oil Law Stalled by Dispute Over Division of Powers*, INT’L HERALD TRIB., Dec. 14, 2006.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* It had been generally believed that the Sunni Arab majority regions are largely resource poor. *Id.* However, recent discoveries by foreign oil companies conducting seismic tests in Iraq have unearthed the possibility of oil wealth in Sunni lands. See James Glanz, *Iraqi Sunni Land Show New Oil and Gas Promise*, N.Y. TIMES, Feb. 19, 2007, at A1. However, it would take many years to actually begin extracting oil or natural gas, and the potential reserves are much smaller than those in Shi’a and Kurdish areas. *Id.*

<sup>339</sup> Wong, *supra* note 336.

<sup>340</sup> *Id.* One reason that the Kurdish representatives want greater control over oil, besides the fact that they sit on some of the richest reserves in Iraq, is that the Kurdish regional government has already begun negotiating and entering into oil contracts. Glanz, *supra* note 203, at A1.

<sup>341</sup> Glanz, *supra* note 203, at A1 (avoiding the terminology “approve” by using the term “reject,” the committee was able to come to a compromise on the draft oil law).

<sup>342</sup> *Id.*

<sup>343</sup> See *id.*

## VI. ELECTIONS AND LEGITIMACY

For a federal system of government to provide a peaceful solution to the desire for self-governance and autonomy, the system by which power is given to leaders must be perceived as legitimate. If the people, or, more importantly, the nationalist political groups, do not believe that the political machinery truly results in allowing the peoples to govern themselves, the nationalist groups will look outside the federal system for autonomy and self-governance.<sup>344</sup> In order to induce factions in a nation to “buy-in” to the federal system, the political process must have legitimacy. The danger feared most by critics of such mixing of ethnicity and politics is that nationalist groups will choose to capitalize on the power they have been given and attempt to secede from the country.<sup>345</sup> If there is no legitimate avenue for the political expression of dissent, violence and attempts at secession are the likely result.

One danger of allowing many divergent voices into the political process is that too many voices will cause that process to fall apart.<sup>346</sup> However, the greater danger of excluding voices in an ethnically-based federal system is that ethnic or religious groups will look for answers outside the political process.<sup>347</sup> The grievances felt by disaffected groups are best heard in the political forum, in which a political solution may be reached, than in any other medium. This section analyzes the legitimacy of the political process in Ethiopia and Iraq by reviewing the most recent national elections in each country—the July 2005 elections in Ethiopia and the December 2005 elections in Iraq.

*A. The July 2005 Elections in Ethiopia*

Ethiopia’s system has generally failed in establishing democratic legitimacy, especially in the period following the 2005 national elections. The participation of some opposition groups in these elections and the facilitation of real dialogue in the political process brought a glimmer of hope for the future of Ethiopia, but this was quickly squashed.<sup>348</sup> The positive reaction of the Oromo Liberation Front (OLF) to the nominally free and fair elections in July of 2005 exemplifies the need for actual political inclusion in Ethiopia. Only by allowing all groups to participate in the political process is the

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<sup>344</sup> See *supra* Part I.B.

<sup>345</sup> See Smith, *supra* note 11, at 2–3.

<sup>346</sup> See generally Rubin, *supra* note 334, at 2.

<sup>347</sup> See generally Kefale, *supra* note 8, at 269–70.

<sup>348</sup> See *infra* Part VI.A.

dialogue kept peaceful and in the political arena, which is one of the main goals of ethnic federalism.

In order for ethnic federalism's goal of peaceful conflict management to succeed, political inclusion is necessary. When the Transitional Government was formed in 1991, it initially included the OLF.<sup>349</sup> However, before the 1992 elections could take place, violent competition between the Oromo People's Democratic Front (OPDO), a member of the EPRDF coalition, and the OLF for political power in the large region of Oromia in southern Ethiopia led to the withdrawal of the OLF from the political process.<sup>350</sup> In the wake of its withdrawal, 20,000 OLF fighters and supporters were arrested, but the OLF continued as an important opposition power in Ethiopia.<sup>351</sup> Until 2005, every election in Ethiopia was won hands-down by the EPRDF, the ruling coalition. The EPRDF-affiliated parties maintained control not only at the national level but also in the regions.<sup>352</sup> The ruling coalition "enjoyed a monopoly of power at all levels of government."<sup>353</sup> However, even under this system, "most ethnic groups appear willing to live within a federal framework."<sup>354</sup>

The Ethiopian national elections of May and August 2005 were a break in the history of EPRDF and TPLF unopposed victory. The 2005 elections were the most free and fair in the country's history, and Ethiopian voters were given a "democratic choice for the first time in their long history."<sup>355</sup> The elections saw a real campaign by legitimate opposition parties, which took an unexpectedly large number of seats in the federal parliament, leaving the majority with barely sixty percent of the seats, becoming a significant minority power.<sup>356</sup> Actual political debate occurred as the governing party opened the

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<sup>349</sup> SINCE THE DERG, *supra* note 117, at 29. The objectives of Oromo nationalism include global recognition of the Oromo, the liberation of the Oromo nation within Ethiopia, the establishment of autonomy or independence, and the restoration of the traditional Oromo democratic system. See JALATA, *supra* note 144, at 56.

<sup>350</sup> MARCUS, *supra* note 15, at 231, 234–35. The Oromo People's Democratic Front (OPDF), as part of the most powerful political coalition, was able to orchestrate the arrest and detention of Oromo Liberation Front (OLF) members and candidates. *Id.* at 234–35.

<sup>351</sup> *Id.* at 235. The OLF continues to launch a minor armed struggle against the government on the platform of political independence and secession of Oromia. The Oromo Liberation Front, *supra* note 151.

<sup>352</sup> Kefale, *supra* note 8, at 267–69. "[M]utual suspicion and alienation between the government and opposition political parties and some other related socio-political factors are responsible for the low level of participation by non-EPRDF parties in the political life of the country." *Id.* at 267.

<sup>353</sup> Habtu, *supra* note 17, at 107. In effect, Ethiopia has been a "de facto one-party state." *Id.* at 112.

<sup>354</sup> *Id.* at 112.

<sup>355</sup> CARTER CENTER STATEMENT, *supra* note 141, at 2.

<sup>356</sup> *Official Result*, *supra* note 141; see also CARTER CENTER STATEMENT, *supra* note 141, at 2. In previous Ethiopian elections, the EPRDF won by astonishing margins, for example, it gained ninety seven

forum by allowing opposition parties to campaign.<sup>357</sup> The response of the OLF to the partial freedom of the 2005 elections proves the potential for political resolution within the framework of the Ethiopian federal state. The validation of the political process in the 2005 elections had the momentary effect of inducing the OLF to reconsider giving up its twenty-three year armed struggle against the Ethiopian government and join the political process.<sup>358</sup> There was discussion within the group as to whether it should seek recognition as political party, and peace talks were initiated.<sup>359</sup>

But the success of the democratic process was short-lived. The near-immediate challenges of election fraud led to mass demonstrations in which security forces killed a reported forty-two demonstrators and arrested and detained thousands of protestors and opposition members.<sup>360</sup> Prime Minister Meles Zenawi, head of the ruling EPRDF, ordered a ban on demonstrations and “took control of the security forces in the capital Addis Ababa.”<sup>361</sup> The events that most detracted from the legitimacy of the political process took place in the fall, as the relations between the opposition members of Parliament and the EPRDF deteriorated.<sup>362</sup> On October 11, 2005, the conflict came to a head as the CUD boycotted the opening session of Parliament because the EPRDF refused to consider reforms of the electoral board.<sup>363</sup> In response, the Parliament “stripped opposition legislators . . . of their immunity from prosecution” on the theory that they would use the immunity “to topple the government.”<sup>364</sup> At this, the remaining opposition parties walked out of Parliament in protest.<sup>365</sup> On October 28, forty members of the CUD were

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percent of parliamentary seats in the last election, leaving only twelve seats to the opposition. *Election Bedlam in Ethiopia, What Are The Lessons?*, NEW TIMES (Kigali), Sept. 13, 2005 [hereinafter *Election Bedlam*].

<sup>357</sup> CARTER CENTER STATEMENT, *supra* note 141, at 2 (describing the environment as “highly contested”); see also *Unconventional*, *supra* note 149.

<sup>358</sup> Jean Hopfensperger, *Oromos Weigh Plan for Peace in Ethiopia*, MINNEAPOLIS STAR TRIB., Oct. 22, 2005. Peace talks between the OLF and the EPRDF also occurred in 1997 but ultimately failed. MARCUS, *supra* note 15, at 248.

<sup>359</sup> Hopfensperger, *supra* note 358; *Ethiopia: Government Quells Unrest in South*, U.N. INTEGRATED REGIONAL INFO. NETWORK, Nov. 22, 2005, reprinted in BBC Monitoring International Reports [hereinafter *Unrest*].

<sup>360</sup> *EU Says Ethiopian Elections “Failed” International Standards*, U.N. INTEGRATED REGIONAL INFO. NETWORK, Aug. 25, 2005, reprinted in BBC Monitoring International Reports.

<sup>361</sup> *Election Bedlam*, *supra* note 356.

<sup>362</sup> *Election Dispute Deepens in Ethiopian Parliament*, N.Y. TIMES, Oct. 12, 2005, at A5 [hereinafter *Dispute Deepens*].

<sup>363</sup> *Id.*; see also *House Approves Appointment of Cabinet Members, Lifts Immunity of MPs Not Sworn In*, ETH. HERALD, Oct. 12, 2005 [hereinafter *Lifts Immunity*].

<sup>364</sup> *Dispute Deepens*, *supra* note 362, at A5.

<sup>365</sup> *Lifts Immunity*, *supra* note 363.

arrested and beaten, leading to a nationwide strike, and a charge of treason against leaders of the CUD party.<sup>366</sup> In Addis Ababa, thousands of protesters were arrested and removed to distant detention facilities and violence spread to the regions.<sup>367</sup> Peace talks between the OLF and the government stalled.<sup>368</sup> The OLF continues to launch its armed campaign against the government of Ethiopia. With the Ethiopian army intervening in Somalia, OLF fighters have reportedly been receiving training from Eritrea in order to fight against Ethiopian forces in Somalia.<sup>369</sup> Ironically, according to Ethiopian news sources, when a group of OLF fighters were captured by the Ethiopian army, they were reported as calling upon the OLF to “refrain from destabilization activities and strive to resolve their problems through dialogue.”<sup>370</sup> In December 2006, an OLF senior spokesperson stated in a speech before the Irish Parliament that the Ethiopian government should agree to participate in an “all-inclusive conference.”<sup>371</sup>

The system of ethnic federalism in Ethiopia will never succeed at meeting nationalist demands as long as opposition voices are quelled. Until the government allows legitimate democratic processes to take place in the country, opposition groups will see no political solution to their problems. However, the momentary success of the 2005 elections proved that given the choice, resistance movements may be willing to give up secessionist demands to participate within the federal system.

### *B. The December 2005 Elections in Iraq*

If it were assured that minority groups would maintain some degree of political power, and that no single political bloc could monopolize control of the country’s wealth and resources to the exclusion of all others, there would be hope for the continued unification of Iraq under the federal Constitution. But unless all major parts of Iraqi society are willing to participate in the

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<sup>366</sup> Micha Odenheimer, *A Dream Defiled, The Betrayal of Ethiopia’s Democracy*, WASH. POST, Dec. 18, 2005, at B4; Binyam Alemayehu, *CUD’s Last Dilemma*, REPORTER (Eth.), Nov. 12, 2005, available at <http://www.ethiopianreporter.com/modules.php?name=News&file=article&sid=760>; *Tension Said Rising in Ethiopian Capital as Opposition Strike Bites*, ETHIOMEDIA, Nov. 1, 2005, reprinted in BBC Monitoring International Reports) [hereinafter *Tension Rising*]. *Ethiomedia* is an opposition news source.

<sup>367</sup> Odenheimer, *supra* note 366, at B4; see also *Tension Rising*, *supra* note 366. Student demonstrations and a jail break in Oromia led to deaths and additional detentions in November. *Unrest*, *supra* note 359.

<sup>368</sup> See *Unrest*, *supra* note 359.

<sup>369</sup> *OLF Captives Confirm Receiving Eritrean Training, Armament*, ETH. HERALD, Jan. 21, 2007.

<sup>370</sup> *Id.*

<sup>371</sup> *Ethiopian Rebel Group Urge Europe, USA to Stop “Appeasing” Government*, ETHIOMEDIA, Dec. 9, 2007, reprinted in BBC Monitoring International Reports.

government established by the Iraqi Constitution, the future of Iraq and its Constitution are bleak. One of the few momentary glimmers of hope in Iraq over the past few years were the elections of December 2005, which succeeded in bringing the Sunni population to the polls.<sup>372</sup> In that election, all the major political blocs came out to vote, indicating that a unified Iraq in which difference was expressed through ballots could be possible. Unfortunately, factors aside from Iraq's constitutional structure have affected the country's unity.

One of the largest challenges identified for the Iraqi government is the building of alliances and forging of a unified government.<sup>373</sup> In the January 2005 elections, while Shi'ite and Kurdish Iraqis turned out en masse, the Sunni population largely boycotted the elections.<sup>374</sup> When it was clear that the Constitution had been adopted regardless of their silence, the scene changed, and in the December 2005 elections, the Sunni population of Iraq was brought into the political process, and all three of the major groups came to the polls.<sup>375</sup> The results of the elections were that the 275 seats in the Parliament were taken as follows: Shi'ite parties hold 130 seats, Kurdish parties hold 58 seats, Sunni Arab parties hold 55 seats, and secularist parties hold 29 seats.<sup>376</sup> This distribution of seats provides the Shi'a with slightly less than a majority, but otherwise distributes the number of seats fairly evenly as compared to the population size of the main ethnic blocs in Iraq.<sup>377</sup>

While the participation of Sunnis was viewed as a hopeful sign by some analysts, others saw only the continued sectarian division of politics in Iraq as a precipitant for the fractioning of the nascent country.<sup>378</sup> Many observers of

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<sup>372</sup> See generally Part VI.B.

<sup>373</sup> Joshua Frydenberg & Mishkat al-Moumim, Op-Ed., *Multi-Ethnic Coalition the Next Test for Iraqi Democracy*, AUSTRALIAN, Dec. 12, 2005. "Building a united, moderate and multi-ethnic coalition from the at times disparate Shiite, Sunni and Kurdish communities will be a big challenge." *Id.*; see also Mutua, *supra* note 46, at 952-53.

<sup>374</sup> See Fred Kaplan, *Elections Aren't Enough*, SLATE, Dec. 15, 2005, <http://www.slate.com/id/2132506/>.

<sup>375</sup> *Talk of the Nation: Kanan Makiya Discusses His Opinion Piece "Present at the Disintegration"* (NPR radio broadcast on Dec. 12, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5049095>.

<sup>376</sup> Anderson & Fekeiki, *supra* note 196, at 7. The main political blocs hold all but three seats in Parliament. *Id.*

<sup>377</sup> See *id.*; Galbraith, *supra* note 23, at 28. The Shi'a parties hold approximately 47 percent of the seats in Parliament, although Shi'a Arabs constitute about 60 percent of the population; the Kurdish population of Iraq is merely 17 percent, while Kurdish parties hold approximately 21 percent of the seats; and the Sunni Arab population of Iraq numbers around 20 percent, with Sunni parties holding exactly 20 percent of the seats in the new Parliament. Anderson & Fekeiki, *supra* note 196, at 7; Galbraith, *supra* note 23, at 28.

<sup>378</sup> See Rubin, *supra* note 334, at 2.



the Iraqi political scene argue that national identity is needed to ensure a sustainable Iraq.<sup>379</sup> Thomas Friedman poignantly defined the challenge for Iraq, “The issue is not how many Iraqi soldiers there are in Iraq. The issue is how many Iraqi citizens there are in Iraq. Without more Iraqi citizens, there will never be enough Iraqi soldiers.”<sup>380</sup> Despite the increase in violence throughout 2006, Iraqi politicians continuously try to move forward and keep all factions involved in the political process.<sup>381</sup> Even though many Parliamentarians ceased attending sessions in the end of 2006 and beginning of 2007, there is nothing to suggest that the abandonment of the process has taken place along party lines.<sup>382</sup> When the speaker of Parliament called the roll in order to shame those legislators who were absent, it included “members from Baghdad neighborhoods to small towns in the hinterland[;] Sunnis, Shiites, Kurds, Christians and Turkmen were all on the list of no-shows that Mashhadani read aloud.”<sup>383</sup>

Although the chaos in Iraq has prevented the Iraqi government from taking many positive steps towards implementing changes in their country, and although sectarian violence is increasingly termed a civil war by the international media, members from all parties have continued to try to make headway on the tasks of government. While this may provide little cause to celebrate, it is hopeful that at least Iraq’s representative officials have not entirely abandoned the political, governmental solutions.

## CONCLUSION

The goal of ethnic federalism is to maintain a unified country in the face of current mistrust due to a long history of oppression and abusive regimes by satisfying the demands of minority groups that have previously not been allowed their fair share of power in their government. The success of the federal solution can be measured by its ability to satisfy the demands of various groups and preventing the establishment of an abusive central regime while at the same time maintaining a unified country. Each region must have

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<sup>379</sup> Thomas L. Friedman, *The Measure of Success*, N.Y. TIMES, Dec. 21, 2005, at A39; Owen, *supra* note 20, at K11; Rubin, *supra* note 334, at 2.

<sup>380</sup> Friedman, *supra* note 379, at A39.

<sup>381</sup> See Joshua Partlow, *Sunnis Boycott Iraqi Parliament Over Kidnapping of Legislator*, WASH. POST, July 3, 2006, at A15.

<sup>382</sup> See Damien Cave, *No-Shows in Baghdad Paralyze Parliament; Deepening Chaos Hamstrings Lawmakers*, INT’L HERALD TRIB., Jan. 25, 2007, at 6.

<sup>383</sup> *Id.*

the autonomy and ability to follow its own policies; the constitution must clearly give to the regions the rights and power to resist federal domination, while at the same time creating a strong enough central government that the country does not simply fall apart. Some strength in a central government is also important for the re-distribution of assets to poorer regions. This Comment has analyzed four areas in which a constitution must succeed to meet the goal of creating a viable system: first, establishing political rights and freedoms of both individuals and groups; second, ensuring the protection of both minorities within states from the regional government and majorities within states from the federal governments; third allowing for regional autonomy through an independent finance; and fourth, ensuring the legitimacy of the government through full freedom and encouragement of participation in the political process by all opposition groups.

The main criticism of ethnic federalism is the claim that it legitimizes and emboldens ethnic nationalists that will turn on the federal system and break it apart to fulfill their secessionist desires.<sup>384</sup> Regardless of whether ethnic federalism exacerbates ethnic identification, it is clear that the system at least creates the space for ethnic groups to express their cultures and languages in a way that frequently was unavailable in the past.<sup>385</sup> The federal government must not abridge political rights, allowing for the incorporation of groups into the political process that would otherwise work against it in violent ways.

While the federal government should have power to protect minorities from discrimination within the regions, the regions should also have the power to protect their population from the oppressive policies or laws of the central government. Regional governments must be able to support and defend the rights of those citizens within their borders against the abuses of the central government.<sup>386</sup> Regional power is meant to divest in the country's different ethnic groups or nations, and since distinctive legal systems are an important part of the self-determination of some ethnic or religious groups, regions should be able to adopt their own distinctive legal systems.<sup>387</sup>

Ethnic federalism attempts to diffuse ethnic nationalist aspirations by creating space in a country's governmental structure for a degree of group

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<sup>384</sup> See Smith, *supra* note 11, at 2–3.

<sup>385</sup> See Ghai, *supra* note 28, at 157–58.

<sup>386</sup> See *supra* Part IV.

<sup>387</sup> See generally Owen, *supra* note 20, K11.

autonomy.<sup>388</sup> Fiscal policy, the power to tax, and federal versus regional ownership and control of a nation's wealth greatly affect the actual power of regions to set their own policies.<sup>389</sup> The division of financial control must be clear, such that regional governments, which generally are responsible for the provision of certain public goods, have a clear right to some amount of income apart from the discretion of the federal government.<sup>390</sup> Finally, the central government must maintain legitimacy, both by allowing for full participation in legitimate elections and by allowing for the full participation of all parties in the political process.<sup>391</sup>

By establishing a federal system which provides for real power-sharing among the different groups within a country, that country may successfully resist the detrimental effects of an overly strong and abusive central government. Although thus far Ethiopia has not succeeded in creating a healthy state under its version of ethnic federalism, and Iraq continues to be torn apart by internal strife, there remains some hope for each country. No country entered this world without internal rifts and struggles. While identity-based federalism may not create a country that exemplifies the Western model of liberal democratic ideals, it may enable a country to hold itself together in the face of deep internal divisions and painfully abusive histories, and provide a good measure of liberal, representative democracy in the process.

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<sup>388</sup> See Super, *supra* note 6, at 2598.

<sup>389</sup> See *id.*

<sup>390</sup> See *supra* Part V.

<sup>391</sup> See *supra* Part VI.

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